No. 15-458

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| Title: | Rocky Dietz, Petitioner v. Hillary Bouldin |
| Docketed: | October 13, 2015 |
| Lower Ct: | United States Court of Appeals for the Ninth Circuit |
| Case Nos.: | (13-35377) |
| Decision Date: | July 24, 2015 |

**Questions Presented**

| ---Date--- | -------Proceedings and Orders---------- |
|---|---|
| Oct 9 2015 | Petition for a writ of certiorari filed. (Response due November 12, 2015) |
| Oct 21 2015 | Order extending time to file response to petition to and including December 14, 2015. |
| Dec 1 2015 | Brief of respondent Hillary Bouldin in opposition filed. |
| Dec 15 2015 | DISTRIBUTED for Conference of January 8, 2016. |
| Dec 15 2015 | Reply of petitioner Rocky Dietz filed. (Distributed) |
| Jan 11 2016 | DISTRIBUTED for Conference of January 15, 2016. |
| Jan 19 2016 | Petition GRANTED. |
| Feb 29 2016 | Joint appendix filed. (Statement of costs filed) |
| Feb 29 2016 | Brief of petitioner Rocky Dietz filed. |
| Mar 4 2016 | SET FOR ARGUMENT ON Tuesday, April 26, 2016 |
| Mar 14 2016 | Record requested from U.S.C.A. 9th Circuit. |
| Mar 15 2016 | CIRCULATED. |
| Mar 30 2016 | Brief of respondent Hillary Bouldin filed. (Distributed) |
| Apr 6 2016 | Brief amicus curiae of the United States filed. (Distributed) |
| Apr 6 2016 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Apr 8 2016 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Apr 15 2016 | Reply of petitioner Rocky Dietz filed. (Distributed) |
| Apr 26 2016 | Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Neal K. Katyal, Washington, D. C.; and John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae). |
| Jun 9 2016 | Adjudged to be AFFIRMED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Kennedy, J., joined. |
| Jul 12 2016 | JUDGMENT ISSUED |

15-458

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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# In the Supreme Court of the United States

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No.

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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Rocky Dietz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 794 F.3d 1093.

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case presents an expressly recognized circuit conflict on an important and recurring question regarding the propriety of recalling a discharged jury. After an automobile accident that left petitioner with significant injuries, petitioner brought suit against respondent in Montana state court, and the case was removed to the United States District Court for the District of Montana. Although respondent admitted responsibility for the accident and accepted liability for petitioner's medical expenses to date, the jury returned a verdict awarding petitioner $0 in damages. The judge discharged the jury, and the jurors left the courtroom; some of the jurors engaged in conversation with the court clerk, and at least one left the courthouse altogether. Upon realizing that the verdict was invalid in light of the facts and applicable law, the judge recalled the jurors, set aside their verdict, and instructed them to begin their deliberations anew. The reassembled jury returned a verdict awarding petitioner only $15,000 in damages.

The district court denied petitioner's motion for a mistrial, App., *infra*, 37a, and the Ninth Circuit affirmed, *id.* at 1a-17a. The Ninth Circuit recognized that a split of authority exists among the federal courts of appeals regarding whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. *Id.* at 6a-10a. Joining the Second, Third, and Seventh Circuits and departing from the Fourth and Eighth Circuits, the Ninth Circuit held that the recall of discharged jurors in those circumstances was permissible. *Id.* at 10a-13a. Because this case presents an ideal vehicle for resolving that conflict, the petition for a writ of certiorari should be granted.

1. On August 9, 2009, petitioner was involved in an automobile accident with respondent at an intersection in Bozeman, Montana. Respondent ran a stoplight at the intersection and collided with the passenger side of petitioner's vehicle. The accident left petitioner with injuries to his lower back, resulting in severe back pain as well as radiating pain in his leg and hip. Petitioner required physical therapy, steroid injections, and prescription and non-prescription medications to address his injury. App., *infra*, 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

2. On January 26, 2011, petitioner brought suit against respondent in Montana state court, asserting a claim of negligence. The case was removed to the United States District Court for the District of Montana on the basis of diversity jurisdiction.

The case proceeded to trial before a jury; with the parties' consent, a magistrate judge presided over the trial. Respondent admitted that he was at fault for the collision and that petitioner was injured as a result. Respondent also stipulated that petitioner's past medical expenses, in the amount of $10,136, were reasonable and related to the collision. App., *infra*, 2a; Pet. C.A. Br. 9, 11; Resp. C.A. Br. 4, 17.

The trial took place over two days. As a result of respondents' stipulations, the only disputed issue at trial was the amount of any *additional* damages that respondent owed petitioner, including future medical expenses. Petitioner presented evidence that he would continue to need regular physical therapy, injections, and medications to alleviate the pain he was experiencing; respondent argued that only some of petitioner's future medical expenses were related to the collision and that petitioner would not actually undertake all of the treatment he identified. In his closing argument, respondent's counsel suggested that the jury should award

petitioner an amount "somewhere between ten and $20,000" to account for the admitted amount of past medical expenses and for additional damages. App., *infra*, 2a; Pet. C.A. Br. 10-11; Resp. C.A. Br. 17-19.

During deliberations, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" App., *infra*, 2a-3a. The note caused the judge to question whether the jury understood that "their verdict may not be less than that amount," and the judge recognized that a verdict in less than the stipulated amount of damages "would be grounds for a mistrial." *Id.* at 3a. Despite that concern, the judge responded to the jury's note simply by informing the jury that the information it sought was not germane to the verdict. *Ibid.*

The jury returned a verdict in favor of petitioner but awarded him $0 in damages. App., *infra*, 3a, 22a, 24a. The judge promptly thanked the jury for its service and ordered it "discharged," telling the jurors they were "free to go." *Id.* at 25a. The court then recessed. *Ibid.*

3. After recessing, the judge realized that the verdict awarding petitioner $0 in damages was not "legally possible" in light of the stipulated amount of damages, and called the jurors back. App., *infra*, 26a. Having summoned counsel to chambers, the judge acknowledged the problem with the verdict and stated that "[a] motion[] for a new trial * * * very likely would be granted" on such facts. *Ibid.* To avoid doing that, the judge decided, over the strenuous objections of petitioner's counsel, to "send the jury back into deliberations" to reach a valid verdict. *Id.* at 26a-29a.

Between the time of their discharge and recall by the judge, the jurors left the courtroom and were permitted to mingle with non-jurors under no instructions or restrictions from the judge. App., *infra*, 25a. Some of the

jurors were seen speaking with the court clerk. *Id.* at 26a-27a. According to the clerk, at least one juror "left the building to go get his hotel receipt" and bring it back. *Id.* at 28a.

Upon the jurors' return to the courtroom, the judge asked the jurors as a group whether they "talked to anybody about the case outside [their] immediate numbers," to which the jurors answered no. App., *infra*, 31a. The judge did not question each juror individually or ask what each juror did after the discharge. *Ibid.* The judge then informed the jurors that, in order to "salvage the work and the expense that's gone on to this point," he was reempaneling the jury. *Ibid.* He instructed the jury that its verdict was "not possible" under "the law and the facts of this case," and further instructed that its verdict must be "$10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.* at 30a. In response to those instructions, a juror protested that the jury had sought that information in its note during deliberations but had received no guidance in response. *Id.* at 32a. The judge disputed the clarity of the jury's note but ultimately "accept[ed] the blame" for "not making this more clear" before the jury delivered its verdict. *Ibid.*

The jurors returned the next morning to begin new deliberations in order to reach a different verdict. Petitioner's counsel renewed his objection to recalling the jurors after discharge and moved for a mistrial. App., *infra*, 35a. The court denied the motion. *Id.* at 37a.

The same day, the reassembled jury returned a verdict awarding petitioner only $15,000 in damages. App., *infra*, 38a, 40a. The district court entered judgment in favor of petitioner in that amount. *Id.* at 21a.

4. Petitioner appealed, contending that the recall of the discharged jurors was impermissible. The court of

appeals affirmed. App., *infra*, 1a-17a. It held that a judge may recall jurors for further service after discharging them as long as the judge "inquir[es] to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a.

a. At the outset, the court of appeals acknowledged that the circuits were divided on the question whether the recall of discharged jurors who have left the judge's presence was permissible. App., *infra*, 6a-10a. In particular, the court of appeals noted that the Eighth Circuit and some state courts had adopted a "bright-line rule prohibiting recall once the jurors have left the confines of the courtroom" after being discharged. *Id.* at 9a (citing *Wagner* v. *Jones*, 758 F.3d 1030, 1035 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015)). By contrast, the court of appeals observed that other courts, including the Second, Third, and Seventh Circuits, had adopted a "totality of the circumstances" approach, under which discharged jurors could be recalled absent evidence that the jurors "were exposed to prejudicial outside influence before the recall." *Id.* at 6a (citing *United States* v. *Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); and *United States* v. *Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994)).

The court of appeals adopted the latter rule and rejected the rule followed by the Eighth Circuit and other courts. App., *infra*, 10a-13a. The court of appeals acknowledged that "there are some advantages to the Eighth Circuit's rule": in particular, it "offers better guidance than an amorphous rule," "is more straightforward to apply," and "better protects against improper external influence." *Id.* at 10a, 11a (internal quotation marks and citations omitted). Yet the court of appeals declined to adopt that rule, on the ground that, while the

"potential for prejudicial influence" exists as soon as jurors have been discharged, that potential may not be realized between the time of discharge and recall in any given case. *Id.* at 11a.

In the court of appeals' view, allowing a judge to recall discharged jurors if the judge determined that the jurors were not exposed to outside influences after discharge struck a "sensible balance" between "fairness and economy" and provided "a cost-effective alternative to an expensive new trial." App., *infra*, 11a. The court instructed that, in evaluating whether recall is permissible, a judge should determine "whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Id.* at 13a (alteration in original) (quoting *Rojas*, 617 F.3d at 677).

Applying that rule to this case, the court of appeals concluded that recalling the discharged jurors to deliberate anew and reach a different verdict was permissible because the judge's collective questioning of the jurors had revealed "no evidence the jury had been tainted by improper influence" during its dismissal. App., *infra*, 16a. At the same time, the court cautioned that recall should be "the exception rather than the convenient rule, lest the sanctity of untainted jury deliberations be compromised." *Id.* at 12a.[1]

b. Judge Bea concurred in the judgment. App., *infra*, 18a-20a. He agreed that discharged jurors could be recalled absent evidence of prejudice, but he disagreed

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[1] The court of appeals rejected other grounds for reversal advanced by petitioner in an unpublished opinion. See 610 Fed. Appx. 637 (9th Cir. 2015). Petitioner does not renew any of those grounds in this petition.

that the judge was affirmatively obligated to inquire into prejudice *sua sponte*. *Id.* at 18a.

## REASONS FOR GRANTING THE PETITION

This case presents a mature conflict on an important and recurring question regarding whether (and, if so, under what circumstances) a judge may recall discharged jurors for further service in a case. In the decision under review, the Ninth Circuit expressly recognized a conflict in the federal courts of appeals on whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. The Ninth Circuit's decision conflicts with decisions of the Fourth and Eighth Circuits but is consistent with decisions of Second, Third, and Seventh Circuits. What is more, state courts of last resort are deeply divided on the question, with the clear majority of the state courts to have considered the issue holding that the recall of discharged jurors is impermissible under such circumstances.

The conflict on the question presented warrants the Court's review in this case. The question presented is one of substantial practical and legal importance. And this case is an optimal vehicle for consideration and resolution of that question, because it involves ideal facts for establishing a rule regarding the recall of discharged jurors. The petition for certiorari should therefore be granted.

### A. The Decision Below Deepens A Conflict On The Question Presented

In this case, the Ninth Circuit expressly recognized the existence of a conflict on the question whether a judge may recall jurors for further service after the judge has discharged the jury and the jurors have left

the judge's presence. See App., *infra*, 6a-10a. This Court's review is warranted to resolve that conflict.

1. a. As the Ninth Circuit noted, see App., *infra*, 9a-10a, the Eighth Circuit has categorically held that a judge may not recall jurors to "render, reconsider, amend, or clarify" a verdict after the judge has discharged the jury and the jurors have "left the courtroom." *Wagner* v. *Jones*, 758 F.3d 1030, 1035-1036 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015).

In *Wagner*, the plaintiff sued the defendant on two claims of employment discrimination under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, respectively. See 758 F.3d at 1032. After the jury repeatedly informed the presiding magistrate judge that it could not reach agreement, the judge declared a mistrial and discharged the jury, and the jurors dispersed. See *id.* at 1032-1033. Two minutes later, however, the judge reassembled the jurors in the courtroom; the record did not indicate the jurors' location or conduct during the intervening moments. See *id.* at 1033 & n.5. The judge then inquired whether the jury's inability to reach a verdict applied to both counts—which he had failed to do before discharging the jury. See *id.* at 1033. The jurors informed the judge that they had reached a verdict for the defendant on the First Amendment claim but had been unable to agree on the Fourteenth Amendment claim. See *ibid.* The judge duly entered judgment on the First Amendment claim and limited his previous mistrial ruling to the Fourteenth Amendment claim. See *ibid.*

The Eighth Circuit reversed, holding that the plaintiff was entitled to a mistrial on both counts because the judge could not recall the jury after discharge. See 758 F.3d at 1037. The Eighth Circuit acknowledged that other courts of appeals had applied a "case-specific anal-

ysis" to determine "whether the jurors became susceptible to outside influences * * * once discharged." *Id.* at 1034 (internal quotation marks and citation omitted). But it rejected that approach and adopted the rule that, "[w]hen the court announces [the jury's] discharge, and they leave the presence of the court, their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict." *Ibid.* (alterations in original) (quoting *Melton* v. *Commonwealth*, 111 S.E. 291, 294 (Va. 1922)).

The Eighth Circuit based its "bright line rule" on the concern that jurors would have the "opportunity" to encounter outside influences when no longer bound by their oath, regardless of whether such an encounter had actually occurred and influenced a juror before recall. 758 F.3d at 1035 & n.9. According to the Eighth Circuit, its rule was "more faithful to precedent"; better accounted for "this age of instant individualized electronic communication"; and "offer[ed] better guidance than an amorphous rule that turns on whether jurors in fact became available for or were susceptible to outside influences." *Id.* at 1035. Under the Eighth Circuit's rule, this case would plainly have come out the other way, because the judge had discharged the jury and the jurors had left the courtroom before the judge recalled them. See pp. 4-5, *supra*.

b. In the progenitor of federal decisions on the subject, the Fourth Circuit adopted a rule under which a jury may not be recalled after discharge once the jurors have left the judge's presence. See *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926).

In *Summers*, after the jury rendered its verdict in a criminal case and the judge announced it was discharged, but while the jurors were still in their seats, de-

fense counsel moved to set aside the verdict on the ground that the defendant had been absent when a supplemental instruction was read to the jury, in contravention of his right to be present for every stage of the proceedings. See 11 F.2d at 585-586. The judge agreed and set aside the verdict. See *id.* at 586. The judge proceeded to read the relevant instruction in the presence of the defendant and sent the jury to deliberate again; the jury then returned a verdict identical to the previous verdict. See *ibid.*

The Fourth Circuit affirmed on the ground that, although the judge had pronounced the jury discharged, the jury remained an "undispersed unit, within control of the court." 11 F.2d at 586. Citing decisions on the subject from state courts, the Fourth Circuit observed that, as long as the jury remains "in the presence of the court," the order of discharge may be revoked. *Id.* at 587. The Fourth Circuit further explained that a jury has been "irrevocably discharged" when jurors are "allowed to disperse and mingle with the bystanders, with time and opportunity for discussion of the case, *whether such discussion be had or not.*" *Id.* at 586 (emphasis added). Under the Fourth Circuit's rule, therefore, this case plainly would have come out the other way as well, because the jurors had left the courtroom (and mingled with non-jurors outside the judge's control) before the judge recalled them. See pp. 4-5, *supra.*

2. By contrast, as the Ninth Circuit expressly recognized in the decision below (and as the Eighth Circuit recognized in *Wagner*), other courts of appeals have held that a judge may recall jurors after the judge has discharged the jury from service and the jurors have left the judge's presence. See App., *infra*, 7a-9a; *Wagner*, 758 F.3d at 1034.

a. In *United States* v. *Figueroa*, 683 F.3d 69 (2012), the Third Circuit affirmed the judge's recall of the jury to hear evidence, deliberate, and render a verdict on an additional count of the indictment, which had been bifurcated from the other counts. See *id.* at 72. The jury found the defendant guilty on two counts and hung on the third count; the judge declared a mistrial on the third count and discharged the jury. After the jurors left the courtroom, the government requested that the jurors be held so that the fourth, bifurcated count could be discussed. See *ibid.* The judge then sent a court employee to reassemble the jurors, and the judge ultimately reempaneled them for further proceedings. See *ibid.*

The Third Circuit held that, because the discharged jurors did not "interact with any outside individuals, ideas, or coverage of the proceedings," the recall of the jurors was permissible. 683 F.3d at 73. The Third Circuit recognized that, upon their release, jurors are no longer within the "protective shield" imposed by the judge throughout the proceedings to protect them from outside influences. *Ibid.* But the Third Circuit reasoned that the "pivotal inquiry" was "whether the jurors became susceptible to outside influences." *Ibid.* Because the discharged jurors were not "subject * * * to outside influence" while they were discharged, the Third Circuit upheld the jurors' recall. *Ibid.*

b. Although they have not gone as far as the Third Circuit in *Figueroa* (or the Ninth Circuit in this case), the Second and Seventh Circuits have both permitted the recall of discharged jurors even after the jurors have left the judge's presence. In *United States* v. *Marinari*, 32 F.3d 1209 (7th Cir. 1994), the judge denied the defendant's request to poll the jury after it had delivered its verdict and been officially discharged; the jurors had left the courtroom but remained in the jury room await-

ing a security escort to the parking lot. See *id.* at 1210, 1212. The Seventh Circuit held that the judge erred in denying the request because, until the jurors dispersed, "the verdict remain[ed] subject to review." *Id.* at 1214 (citing *Putnam Resources* v. *Pateman*, 958 F.2d 448, 459 (1st Cir. 1992)).[2] The Seventh Circuit reasoned that it was only when the jurors "separat[ed] and dispers[ed]" that they could actually be "exposed to outside contacts" and thus could not be recalled. *Ibid.*

Similarly, in *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010), the courtroom deputy misread the jury's verdict form, omitting the word "base" from the jury's specific finding that the drug involved was cocaine base. See *id.* at 673. The jury was polled and stated its agreement with the verdict as read. See *ibid.* The judge then discharged the jury, and the jurors returned to the deliberation room to await the judge, who was going to thank them for their service. See *ibid.* After realizing the error, the judge recalled the jurors to have the verdict form reread correctly and the jurors repolled. See *ibid.*

The Second Circuit upheld the conviction, stating that, in determining whether recall of discharged jurors was permissible, a court "must evaluate the specific scenario presented" to determine whether recall would prejudice the parties or undermine confidence in the verdict. 617 F.3d at 677. The Second Circuit determined that the jurors had not been "exposed to outside factors" and that it could "be confident that no further delibera-

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[2] In *Putnam Resources*, the First Circuit stated in dicta that "[r]eassembly [of the jury] was a distinct possibility" where the jury had not dispersed. 958 F.2d at 457. But the First Circuit ultimately held that, by failing to request recall of the jury, the plaintiff had waived his objection to a potential deficiency in the verdict form. See *ibid.*

tion took place" during the short time that the jurors had been discharged. *Id.* at 678. Accordingly, the Second Circuit held that the recall was permissible, at least for the limited purpose of allowing the jury to clarify its previously issued verdict. See *id.* at 678 & n.3.

3. Beyond the conflict among the federal courts of appeals, state courts of last resort have long been intractably divided on the question presented. Almost half of the state courts of last resort have addressed the question, with the clear majority of those courts adopting a bright-line rule similar to the Eighth Circuit's.

Fifteen state courts of last resort have held that a judge may not recall discharged jurors once they have left the judge's presence and control, with many of those courts expressly stating that it is irrelevant whether the jurors were exposed to outside influences or otherwise prejudiced during the period of discharge. See *T.D.M.* v. *State*, 117 So. 3d 933, 938-940 (Ala. 2011); *Spears* v. *Mills*, 69 S.W.3d 407, 410-414 (Ark. 2002); *People* v. *Hendricks*, 737 P.2d 1350, 1358-1360 (Cal. 1987); *Montanez* v. *People*, 966 P.2d 1035, 1036-1037 (Colo. 1998); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 802-805 (Mont. 2006); *Harrell* v. *State*, 278 P. 404, 406 (Okla. Crim. App. 1929); *Commonwealth* v. *Johnson*, 59 A.2d 128, 130 (Pa. 1948); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *State* v. *Nash*, 294 S.W.3d 541, 550-553 (Tenn. 2009); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Melton* v. *Commonwealth*, 111 S.E. 291, 293-294 (Va. 1922). An additional three state courts of last resort have gone even further

and drawn the line at the point at which the judge announces the jury's discharge. See *West* v. *State*, 92 N.E.2d 852, 855 (Ind. 1950); *Sargent* v. *State*, 11 Ohio 472, 473-474 (1842); *Yonker* v. *Grimm*, 133 S.E. 695, 697-698 (W. Va. 1926).

By contrast, five state courts of last resort have held that a judge may recall discharged jurors even if the jurors have left the judge's presence and control, as long as the jurors were not exposed to outside influences during the period of discharge. See *Lapham* v. *Eastern Massachusetts Street Railway Co.*, 179 N.E.2d 589, 591 (Mass. 1962); *Anderson* v. *State*, 95 So. 2d 465, 467-468 (Miss. 1957); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991); *Drop Anchor Realty Trust* v. *Hartford Fire Insurance Co.*, 496 A.2d 339, 345-346 (N.H. 1985); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006).

4. As matters currently stand, therefore, judges across the country are subject to inconsistent rules concerning the circumstances under which they are permitted to recall discharged jurors. Federal judges in the Fourth and Eighth Circuits may not recall discharged jurors after they have left the judge's presence, but judges in the Second, Third, Seventh, and Ninth Circuits are permitted to do so. Indeed, in the instant case, the Ninth Circuit adopted arguably the most permissive standard of any of the federal circuits, because it approved the recall of jurors who, according to the uncontroverted record, had not only left the judge's presence but also mingled with non-jurors outside the judge's control. The entrenched conflict on the propriety of recalling discharged jurors warrants this Court's review.

### B. The Question Presented Is An Important And Recurring One That Warrants Review In This Case

The question presented here—whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case—is a frequently recurring question of fundamental importance to the operation of jury trials in this country. That question is ripe for the Court's consideration in this case.

1. The question presented is a recurring one of substantial legal and practical importance. The recall of discharged jurors raises concerns about the basic fairness of jury trials in both civil and criminal cases. As then-Chief Judge Cardozo put it, when a jury has been discharged from its duties and is no longer under the judge's supervision, "it has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929). Upon discharge, jurors are no longer bound by their oath or the judge's instructions and may be exposed to outside opinions and evidence. See *Marinari*, 32 F.3d at 1214. Even if jurors are not subject to outside influences, moreover, they may simply change their minds after delivering the verdict and being discharged from service in the case. See *Wagner*, 758 F.3d at 1036.

The question whether (and, if so, under what circumstances) a judge may recall discharged jurors thus directly implicates the "fundamental guaranty of a fair trial," as embodied in the constitutional right to a jury trial as well as the broader right to due process. *Nash*, 294 S.W.3d at 553; see *Hendricks*, 737 P.2d at 1358. Put another way, the question presented by this case is what level of protection is necessary to preserve that right. As

noted above, a majority of the courts nationwide to have addressed the question have determined that a bright-line rule forbidding recall after discharged jurors have left the judge's presence and control "strikes the proper balance between the pursuit of substantive justice and the need to maintain confidence in the sanctity of jury verdicts," *Pumphrey*, 135 P.3d at 804, in light of the "paramount consideration * * * that the jury be free from even the appearance of taint or outside influences," *Spears*, 69 S.W.3d at 413. Such a bright-line rule promotes the finality of jury verdicts instead of fostering protracted post-trial litigation. If a jury could be reempaneled after discharge, jurors "would be harassed and beset by the defeated party," *McDonald* v. *Pless*, 238 U.S. 264, 267 (1915), with "serious potential for confusion, unintended compulsion and, indeed, coercion," *Wagner*, 758 F.3d at 1036.

It should go without saying, moreover, that the practical consequences of recalling discharged jurors are enormous. In cases such as this one, the result of applying the conflicting rules concerning the recall of discharged jurors is the difference between a potentially tainted verdict and a new trial. Indeed, this case is a particularly egregious example, because the potentially tainted verdict was issued by the same jury that had previously issued a verdict so unfavorable to petitioner as to be invalid. The question presented thus has significant implications for litigants, courts, and the public perceptions of fairness of the judicial system.

The question whether judges may recall discharged jurors also arises with remarkable—and unfortunate—frequency. As one court observed almost a decade ago, there are a "surprising number of cases" in which judges have sought to reempanel discharged juries to amend or clarify earlier verdicts. *Rodriguez*, 134 P.3d at 739 (in-

ternal quotation marks and citation omitted). In fact, since that observation was made, the question presented has been addressed by four additional federal courts of appeals (and three additional state courts of last resort). See App., *infra*, 10a-13a; *Wagner*, 758 F.3d at 1036; *Figueroa*, 683 F.3d at 73; *Rojas*, 617 F.3d at 676-677; *Lahaina Fashions*, 319 P.3d at 358; *T.D.M.*, 117 So. 3d at 935; *Nash*, 294 S.W.3d at 543. The Court should grant review to resolve that important and recurring question.

2. a. The question presented is ripe for the Court's consideration, and this case constitutes an optimal vehicle in which to resolve it. The decisions from six federal courts of appeals (and at least 23 state courts of last resort) have fully developed the relevant arguments on both sides of the question, and further percolation is exceedingly unlikely to be of any benefit.

This case, moreover, is the ideal vehicle for deciding the question presented because it raises that question in particularly clean and stark terms. It is undisputed that the jury's initial verdict in this case was invalid. See App., *infra*, 28a. And the invalidity of the verdict was not the result of a mere clerical error; as the court of appeals observed, in order to reach a valid verdict, the recalled jurors were required to "deliberate anew upon a substantive matter." *Id.* at 16a. In addition, by the time the judge recalled the jurors, they had already dispersed. All of the jurors had left the courtroom; some of the jurors had engaged in conversation with the court clerk; and at least one had apparently left the courthouse altogether. See *id.* at 25a-28a. When the judge asked the reassembled jurors as a group what had happened during the period between their discharge and recall, they assured the judge that they had encountered no prejudicial influences. See *id.* at 31a. This case thus squarely presents the Court with the opportunity to de-

cide whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence (and, indeed, are outside the judge's control), the judge may recall the jurors for further service in the same case—here, for the purpose of reopening their deliberations and issuing a new verdict.

b. To the best of our knowledge, despite the frequency with which the question presented arises in the lower courts, the Court has had only one previous opportunity since the conflict has arisen to consider a version of that question, in *Wagner*, *supra*.[3] Although the Court denied the petition in *Wagner*, this case is a vastly superior vehicle for further review, for three reasons.

*First*, to state the obvious, the Ninth Circuit's decision in this case deepens the conflict that existed at the time of the petition in *Wagner*. The Ninth Circuit expressly acknowledged the conflict, see App., *infra*, 9a-10a, and proceeded specifically to reject the rule adopted by the Eighth Circuit in *Wagner*, see *id.* at 10a-13a. To the extent there was any doubt about the existence of a conflict at the time of *Wagner*, therefore, the Ninth Circuit's decision dispels it.

*Second*, the petitioners in *Wagner* took issue with the Eighth Circuit's characterization of the facts of the case, arguing that the jurors remained an undispersed unit within the judge's control (and, for that reason, that the jurors' recall was permissible). See Pet. at ii, *Wagner*, *supra* (No. 14-615). As a result, the respondent in *Wagner* was able to argue that, as a result of the asserted

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[3] While a petition for certiorari was also filed in *Lahaina Fashions*, *supra*, it presented distinct questions focusing on the validity of the *initial* verdict. See Pet. at 20-24, *Lahaina Fashions*, *supra* (No. 13-1295).

ambiguity in the record, it was not clear whether there was a conflict between the Eighth Circuit's decision and the decisions cited by the petitioners. See Br. in Opp. at 8, *Wagner*, *supra*. Here, by contrast, it is indisputably the case that the jurors had left the courtroom (and had mingled with non-jurors outside the judge's control) before they were recalled. See pp. 4-5, *supra*. For that reason, the Ninth Circuit's decision in this case unambiguously conflicts with the Eighth Circuit's decision in *Wagner*, which announced a "bright-line rule prohibiting recall once the jurors have left the confines of the courtroom." App., *infra*, 9a.

*Third*, *Wagner* raised a complication that is not present here. Applying its rule, the Eighth Circuit remanded the case for a new trial on the ground that the recall of the discharged jurors was impermissible. 758 F.3d at 1037. The Eighth Circuit, however, proceeded to question whether the district court had properly instructed the jury on the burden-shifting framework applicable to the plaintiff's First Amendment claim, and it "direct[ed] the district court to revisit th[o]se instructions" on remand. *Ibid.* As the respondent in *Wagner* pointed out, therefore, it was "almost certain[]" that the Eighth Circuit would have granted a new trial anyway on that independent ground. See Br. in Opp. at 20, *Wagner*, *supra*. Here, the Ninth Circuit denied petitioner a new trial, and the judgment below is in all respects final.

This case thus cleanly and squarely presents the question whether a judge may recall discharged jurors for further service after the jurors have left the judge's presence. And it cannot be disputed that there is a circuit conflict on that important and recurring question. Accordingly, the Court should grant the petition for certiorari and answer that question here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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# APPENDIX

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 13-35377

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Rocky Dietz, Plaintiff-Appellant

*v.*

Hillary Bouldin, Defendant-Appellee

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July 24, 2015

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Before: FISHER, BEA, and MURGUIA, Circuit Judges.

### OPINION

FISHER, Circuit Judge.

We consider, as a matter of first impression in this circuit, whether a jury can be recalled shortly after it has been ordered discharged. Joining the majority of circuit courts to have decided the issue, we hold a district court may re-empanel a jury shortly after dismissal, but only if, during the period of dismissal, the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict.

## BACKGROUND

Hillary Bouldin's vehicle collided with Rocky Dietz's in August 2009. Dietz subsequently filed a negligence complaint in Montana state court against Bouldin for "injuries including to his low back" and "physical pain, suffering, grief, anxiety and a loss of course of life" stemming from the accident. The case was subsequently removed to federal court.

Before trial, Bouldin admitted he was at fault and that Dietz was injured as a result of the accident. The parties stipulated to $10,136 in past expenses Dietz incurred as a result of the accident. The only disputed issue at trial was the amount of future damages Bouldin owed Dietz. Dietz presented evidence he would need regular physical therapy, medication and injections to alleviate the pain he was experiencing following the accident. Bouldin emphasized that Dietz had a long list of medical conditions predating the collision, that only some of his medical expenses were related to the accident and that he was exaggerating the amount of treatment he would actually seek.

During closing argument, Bouldin's counsel reminded the jury of the stipulated amount of past damages and explained that its award additionally had to include the reasonable value of necessary care, treatment and services received and those reasonably probable to be required in the future. He suggested the jury award Dietz an amount "somewhere between ten and $20,000, depending on what you feel his relief is, what level of pain he has, and how his condition has been affected by this automobile accident."

During deliberations, a juror sent the following question to the judge: "Has the $10,136 medical expenses

been paid; and if so, by whom?" The court responded that the information was not germane to the jury's verdict. Speaking to the parties' counsel, the court then observed:

> What I'm wondering—[l]et's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the argument and the instructions, that their verdict may not be less than that amount?

Bouldin's counsel said he had made the point "crystal clear," and the court agreed. Accordingly, the court took no further action to instruct the jury to award at least $10,136 in damages. The jury returned with a verdict, finding for Dietz but awarding him damages in the amount of $0. The court asked counsel if they would like the jury polled, and both declined. The court then thanked the jurors for their time, told them they were "free to go," discharged them and recessed. Realizing the verdict was a legal impossibility given the stipulated damages exceeded $10,000, the court quickly called back the jurors, noting for the record it was doing so "moments after having dismissed them." It told the jurors their verdict violated the stipulation, inquired whether any of them had experienced undue outside influence in the period following dismissal and, when they collectively responded they had not, ordered them to reconvene the following morning to issue a new verdict consistent with the stipulation. Dietz objected to this procedure and moved for a mistrial, arguing recall was not appropriate because the jury had been dismissed. The jury again

found for Dietz and awarded him damages in the sum of $15,000. Dietz timely appealed.

## DISCUSSION

Dietz argues the district court erred by recalling the jury after it had already been dismissed. Given the circumstances here, where the court promptly recalled the jurors, questioned them and found they were not exposed to prejudicial influence during the brief duration of their dismissal, we conclude the recall was not an abuse of discretion. We thus affirm the judgment.[1]

### I. Standard of review

We first address the correct standard of review for a district court's decision to re-empanel discharged jurors. Dietz argues "the judgment is void because the district court acted in a manner inconsistent with due process of law," so we must review de novo the district court's decision to re-empanel the jurors. Bouldin counters that the correct standard should be abuse of discretion because Dietz requests a new trial based on an alleged error committed by the district court.

Federal Rule of Civil Procedure 60(b)(4) provides relief from a final judgment if it is void as a matter of law. The list of such judgments is "exceedingly short," and "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United*

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[1] We address Dietz's remaining arguments in a concurrently filed memorandum disposition.

*Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010).

Here, Dietz does not allege that the court lacked jurisdiction to enter the judgment or that he was deprived of notice or an opportunity to be heard. Instead, he argues the court should have granted his motion for a mistrial because the verdict did not comply with the stipulated damages. Denials of motions for mistrial are reviewed for abuse of discretion. *See United States v. Hagege*, 437 F.3d 943, 958–59 (9th Cir. 2006). Therefore, that is the standard of review we apply here.

## II. Legal standard

Our circuit has not yet addressed when a district court abuses its discretion by recalling jurors after dismissing them.[2] Therefore, we must decide what legal standard governs our analysis.

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[2] We have upheld the district court's decision to reconvene a jury five weeks after trial to clarify an ambiguous verdict. *See E.F. Hutton & Co. v. Arnebergh*, 775 F.2d 1061, 1063–64 (9th Cir. 1985). In that case, however, we did not need to reach the issue of whether such a recall was permissible because the parties had stipulated to the procedure. *See id.* at 1064.

We have also encountered the question of jury reassembly in other contexts. *See, e.g., Harrison v. Gillespie*, 596 F.3d 551, 574–75 (9th Cir. 2010) (refusing to allow jury to be reconvened three years after death penalty trial), *rev'd on other grounds en banc*, 640 F.3d 888 (9th Cir. 2011); *United States v. Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991) (rejecting proposal to reconvene a jury for polling over two years after the trial had ended); *United States v. Washington*, 819 F.2d 221, 224–25 (9th Cir. 1987) (refusing to recall jury two years after trial to question individual jurors about potential prejudice).

Typically, a jury is no longer an entity after the court discharges it, and its duties "are presumed to be at an end when its verdict has been rendered, received, and published." *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926). When the jury has "been discharged altogether and relieved, by the instructions of the judge, of any duty to return . . it has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret v. City of New York*, 169 N.E. 280, 280 (N.Y. 1929) (opinion of Cardozo, C.J.). Correspondingly, the "protective shield" imposed by the district court, which prevents jurors from being subjected to prejudicial outside influences, is removed upon dismissal. *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *see also United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994) (observing that "after discharge, the jurors are quite properly free to discuss the case with whomever they choose").

Nevertheless, several courts have recognized that in certain limited circumstances, a district court may recall a jury immediately after dismissal to correct an error in its verdict. *See Figueroa*, 683 F.3d at 73; *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *Marinari*, 32 F.3d at 1215. These courts look at the totality of circumstances to determine whether the jurors were exposed to prejudicial outside influence before the recall. *See Wagner v. Jones*, 758 F.3d 1030, 1034 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (2015) ("One line of authority . . requires a case-specific analysis of 'whether the jurors became susceptible to outside influences and [were] beyond the control of the court once discharged.'" (quoting *Figueroa*, 683 F.3d at 73)). This line of cases appears to originate from *Summers v. United States*, 11 F.2d 583.

In *Summers*, immediately after the district court pronounced the jury discharged but before the jurors dispersed, the court realized it had read one of the charges to the jury outside the presence of the defendant. *See* 11 F.2d at 586. Because the jurors had not yet left their seats, the court set aside the verdict, reread the charge in the presence of the defendant and sent the jurors to deliberate anew. *See id.* The defendant objected, contending this process was improper because the jury had been discharged. *See id.* The court observed it would be "guilty of a very technical ruling" if it held the jury was dismissed before it had even left the box. *See id.* The Fourth Circuit sustained the court's actions, holding that a jury

> may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

*Id.*

Other circuits have extended the *Summers* rule to situations where the jurors have been released but effectively remained under control of the court.[3] For example,

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[3] In *Summers*, the jurors had not yet left the jury box and therefore had no "'opportunity' to encounter an outside influence." *Wagner*, 758 F.3d at 1035 n.9 (quoting *Summers*, 11 F.2d at 586). As the Eighth Circuit explained, "[i]n any meaningful sense, once a juror leaves direct judicial supervision in the courtroom, he or she virtual-

the Third Circuit upheld a district court's decision to re-empanel a jury where the court "immediately sent a court employee to hold the jury" after initially releasing it. *Figueroa*, 683 F.3d at 72. The court considered the "pivotal inquiry" to be whether the jury "became susceptible to outside influences" during the dismissal. *Id.* at 73 (noting "[t]he jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings").

Similarly, the Second Circuit upheld a district court's decision to reconvene a dismissed jury to clarify a technical error in the verdict. *See Rojas*, 617 F.3d at 677. The court was informed of the error six minutes after the jurors had been discharged, at which point they had returned to the deliberation room. *See id.* at 673, 678 n.3. The circuit court noted the jurors had not been "exposed to outside factors" during the brief discharge, so recall was proper. *See id.* at 678 (internal quotation marks omitted).

The Seventh Circuit has also recognized that "[u]ntil the jury is actually discharged by separating or dispersing (not merely [by] being declared discharged), the verdict remains subject to review." *Marinari*, 32 F.3d at 1214. In that case, defense counsel requested a poll of the jury after the jurors had left the courtroom, but while they remained sequestered in the jury room await-

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ly always has the 'opportunity' to encounter outside influences." *Id.* *Summers* did not address whether jurors who had briefly left the courtroom could validly be recalled. Later cases have relied on *Summers* for the more basic proposition that a jury may be recalled shortly after it has been discharged if it was not exposed to prejudicial outside influences during dismissal, even where jurors have left the courtroom. *See, e.g.*, *Figueroa*, 683 F.3d at 73.

ing a security escort to the parking lot. *See id.* at 1215. The court concluded that, although the jurors had been declared dismissed, they "had not dispersed and they remained untainted by any outside contact." *Id.* Thus, they were available to be recalled and polled. *See id.*

By contrast, a handful of state courts and, most recently, the Eighth Circuit, have eschewed this case-specific analysis and instead adopted a restrictive bright-line rule prohibiting recall once the jurors have left the confines of the courtroom. *See Wagner*, 758 F.3d at 1035 ("[W]here a court declares a mistrial and discharges the jury which then disperses from the confines of the courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts."); *see, e.g.*, *Spears v. Mills*, 69 S.W.3d 407, 413 (Ark. 2002) (noting the "strict" and "absolute" rule that a jury may not be recalled once it has "left the presence and control of the court").

In *Wagner*, the Eighth Circuit case, the jurors, who were deliberating on two counts, told the court they were deadlocked after two and a half days of deliberations. *See* 758 F.3d at 1032. The court declared a mistrial and thanked the jurors for their service. *See id.* at 1033. Two minutes later, the court reassembled the jurors because it had failed to ask whether they were deadlocked on one or both counts. *See id.* The foreperson said the jury had reached a verdict for the defendant on Count I, and the court accordingly amended the previous mistrial ruling over the plaintiff's objection. *See id.* The Eighth Circuit

reversed, holding the error in the verdict was "beyond correction after the jury left the courtroom." *Id.* at 1036.[4]

We recognize there are some advantages to the Eighth Circuit's rule. As that court observed, it "offers better guidance than an amorphous rule," *id.* at 1035, and it is more straightforward to apply than the totality-of-circumstances approach. In addition, by foreclosing the possibility of recall after jurors have left the courtroom, it is theoretically more protective of litigants' right to a jury untainted by improper external influence. *See id.* at 1036 n.10 (observing that "even in civil cases, both the litigants and the public must have the utmost confidence that verdicts remain untainted"); *see also Lahaina Fashions, Inc. v. Bank of Hawaii*, 297 P.3d 1106, 1118 (Haw. Ct. App. 2013) (opining that forbidding recall once jurors have left the courtroom "offers the greatest protection against the erosion of public confidence in juridical impartiality"). The Eighth Circuit emphasized that, "[i]n this age of instant individualized electronic communication and widespread personal control and manage-

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[4] The facts in *Wagner* were much more suggestive of prejudicial influence than the facts here. There, the court had declared a mistrial on the very charges the jury was then recalled to deliberate. As the Eighth Circuit noted, "nothing indicate[d] that the jury understood that the case was being placed back in their hands, and that they were being re-polled essentially to rescind the mistrial." 758 F.3d at 1036. Furthermore, the judge had provided the jurors with "letters" to complete and send back to the court as a post-trial assessment as to which the judge specifically told them: "If there's something about this case that we need to know about, this is your opportunity to tell us." *Id.* (alteration omitted). At this point, the admonition not to discuss the case with others had been lifted, and there was no information in the record about the jurors' conduct once they had dispersed from the courtroom. *See id.*

ment of pocket-sized wireless devices," such a restrictive rule better protects against improper external influence. *Wagner*, 758 F.3d at 1035.

Precisely because we live in an age of instant electronic communication, however, there is nothing talismanic about the courtroom door. For that reason, we should not adopt such a rigid rule. Jurors can easily send messages and communicate with outside parties before stepping out of the jury box, let alone the courtroom. Once a court has discharged the jurors, thus lifting the "protective shield" and enabling them to discuss the case with others, it triggers the potential for prejudicial influence.

But at the same time, just because jurors may potentially engage in improper outside contacts the moment they are dismissed does not mean they actually do. Regardless of whether the dismissed jurors have remained in the courtroom or left, before deciding to recall them, district judges must conduct a proper inquiry into the circumstances to ensure jurors were not exposed to prejudicial influences during the brief period of dismissal. The court—and, if permitted by the court, counsel—can specifically question the jurors about what they did during the moments they were dismissed, and through its evaluation of their responses and observations of the courtroom, determine whether recall is appropriate.

Such a rule strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial. In the somewhat analogous context of resubmission of special verdict questions, we explained that "[a]llowing the jury to correct its own mistakes conserves judicial resources and the time and convenience of citizen jurors, as well as those of the parties" and "best comports with

the fair and efficient administration of justice." *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003).[5] We give weight to those same principles by adopting the totality-of-circumstances approach here. That said, recall should be the exception rather than the convenient rule, lest the sanctity of untainted jury deliberations be compromised.

In sum, we hold that, in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict.[6,7] *See Figueroa*, 683 F.3d at 73 (holding the "piv-

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[5] An important factual difference between *Duk* and this case is that the jury in *Duk* had not been declared discharged, nor had it dispersed. *See id.* at 1058. Nevertheless, the policy considerations underlying *Duk* are relevant here, where the jury was dismissed for a matter of moments and was still available to be recalled.

[6] We presume for purposes of this holding that one party objects to the recall procedure. Such an inquiry may not be necessary where the parties have explicitly stipulated to the recall procedure. *Cf. E.F. Hutton & Co., Inc. v. Arnebergh*, 775 F.2d 1061, 1063–64 (9th Cir. 1985) (upholding court's recall of jurors five weeks after they were discharged to interview them about the verdict because parties had stipulated to the procedure).

[7] The concurrence contends such an inquiry is "inconsistent with our system of adversarial justice." In the context of jury management, however, the district court regularly engages in such inquiries, as the cases the concurrence itself cites reveal. *See, e.g., United States v. Vartanian*, 476 F.3d 1095, 1098–99 (9th Cir. 2007) (describing district court's "careful interview" of jury members before dismissing juror for good cause); *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999) (explaining the trial court's "investigative power puts it in the best position to evaluate the jury's ability to

otal inquiry is whether the jurors became susceptible to outside influences"). In deciding whether recall is proper, the district court "must evaluate the specific scenario presented in order to determine whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Rojas*, 617 F.3d at 677.

### III. Application

Having concluded the totality of circumstances analysis is proper, we next consider whether the jurors here were in fact exposed to prejudicial outside influences during the brief period of the dismissal. Because the record supports the district court's finding they were not, recalling them was not an abuse of discretion.

When the court called back the jurors, it noted for the record that it was doing so "moments after having dismissed them." In *Figueroa*, the district court had "retained control of the jury at all times after it informed the jurors they were released," 683 F.3d at 73, because it had "immediately sent a court employee to hold the jury" after initially releasing it, *id.* at 72. Similarly, here, the record reflects that the court "just stopped the jury from leaving the building when [it] told them they were dismissed," because "in a fairly quick second thought," the court realized the verdict was "not legally permissible." Given the court was able to recall the jurors promptly after dismissal, it appears they had not yet dispersed. *Cf.*

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deliberate" (quotation marks omitted)). Our holding here is entirely consistent with the principle that, once a district court has been made aware of a problem relating to jury deliberations, it must investigate the problem. Of course, the details of the investigation remain within the district court's discretion.

*id.* at 73 (noting that, although jury had been "momentarily released," they had not "disperse[d]"); *Rojas*, 617 F.3d at 678 & n.3 (six minutes between jury discharge and reassembly suggested jury had not "dispersed").

Dietz argues the jury had dispersed because at least one juror had left the floor, or possibly the building, to get his hotel receipt and other jurors were observed talking to the clerk of court in the courtroom.[8,9] After Dietz's counsel voiced this concern, the court asked the jurors whether "anything occurr[ed] during the . . . few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers." The jurors responded they had not:

> JURY PANEL VOICES: No, sir. No.
>
> THE COURT: Did we get everybody stopped in time for that not to occur?
>
> JURY PANEL VOICES: (Heads nod) Uh-huh, yes.
>
> JUROR: I didn't. You did. Most of us were just outside the door here. And there was only two that went down the—

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[8] The record is inconsistent as to whether the juror who left exited the building or just the floor. The clerk of court noted for the record that "there was one [juror] that left the building to go get his hotel receipt." When the court quizzed the jurors, it asked if any of them had gone to the "first floor," "maybe to get a hotel receipt," and one juror responded, "I did that, but I didn't talk to anybody."

[9] While registering this objection, Dietz's counsel said he had observed certain jurors talking to the clerk of court but conceded he was "not at all" suggesting that there was substantive discussion about the case.

> THE COURT: That's what I tried to do. I understand one juror had gone to the first floor and it was maybe to get a hotel receipt.
>
> JUROR: I did that, but I didn't talk to anybody.
>
> THE COURT: You didn't talk to anyone. So, in terms of you being contaminated by any outside information, that is not a factor.
>
> JUROR: No.
>
> JURY PANEL: No.

This colloquy supports the conclusion the jury had not "disperse[d] and interact[ed] with any outside individuals, ideas, or coverage of the proceedings." *Figueroa*, 683 F.3d at 73. Importantly, the district court specifically asked the jurors whether they had spoken to anyone about the case. It also asked them whether they had been "contaminated by any outside information." The jurors responded they had not. The court was in the best position to evaluate the jurors' responses, including the credibility of those responses.

Because the right to an impartial, untainted jury is of utmost importance, we do note that an individualized examination would be preferable to the collective questioning employed here—whether by asking jurors to respond individually or by questioning each juror separately.[10] During such an inquiry, the court or counsel could ask specific questions to discern whether any juror was susceptible to prejudicial influence, such as what the ju-

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[10] The extent of questioning required may depend on the length and complexity of the case. Those involving longer trials or more complex issues may require a more searching, individualized examination.

rors did during the dismissal; whether they spoke to anyone, and, if so, the content of their conversations; whether they overheard discussions about the case; whether they used cell phones or other devices to communicate; and whether they were influenced by any discussions they had or overheard.[11]

That the jurors were recalled to deliberate anew upon a substantive matter rather than simply to correct a technical error does not change our conclusion. *Cf. Rojas*, 617 F.3d at 678 & n.3 (limiting holding to correction of technical errors). There was no evidence the jury had been tainted by improper influence during the momentary dismissal. *Cf. Figueroa*, 683 F.3d at 73 (upholding district court's decision to recall jury after momentary dismissal to deliberate on an additional count it had not initially considered). Furthermore, the jury's initial verdict appears to have resulted from a misunderstanding regarding the effect of the legal stipulation.[12] *Cf. Sierra*

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[11] The court, in its discretion, may also afford counsel an opportunity to voir dire the jurors along these lines as well. Plaintiff's counsel did not request that opportunity here nor object to the group questioning.

[12] This misunderstanding could have been avoided altogether had the parties submitted the written stipulation into evidence and proposed a jury instruction on the issue. During the first round of deliberations, the jury sent a note asking the court if the stipulated $10,136 in medical expenses had been paid and by whom. The court responded that this consideration was irrelevant. At this juncture, the court could have instructed the jury that it needed to award at least the stipulated damages plus some additional amount. Unfortunately, it did not do so. However, after realizing the error in the verdict and recalling the jurors, this is exactly what the court did. It explained to the jurors:

> There was never any dispute, it was admitted from the beginning in this case, that the medical bills of

*Foods v. Williams*, 816 P.2d 466, 467 (Nev. 1991) (upholding recall of jury to correct a damages award that failed to account for its contributory negligence finding).

In conclusion, the district court did not abuse its discretion by recalling the jurors in lieu of declaring a mistrial. First, and importantly, the recall occurred very shortly after the dismissal. Although the court might have conducted an individualized and more detailed inquiry, its questioning adequately confirmed the jurors had not been exposed to prejudicial influences during the brief period between dismissal and recall. The court's decision to recall the jurors was thus not an abuse of discretion.

**AFFIRMED.**

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> $10,136.75 were caused by this collision. It doesn't matter by whom or to whom. That was the admission in the case. So the verdict as a starting point has to be at least $10,136.75.. Secondly, it was admitted by the Defendant that some injury occurred in this accident.... That being the case, your verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury which you find was inflicted.

Thus properly instructed, the jury was quickly able to come to a verdict consistent with the legal stipulation.

BEA, Circuit Judge, concurring in the judgment:

I agree with the majority that the district court judge did not err in re-empaneling the jury in this case. I further agree with the majority's conclusion that the district court judge may re-empanel a jury only if he finds that the jury was "not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Maj. Op. at 14. I do not agree, however, that the district court *judge* should be required to undertake "an appropriate inquiry" into whether prejudicial influences have tainted the jury. *Id.* Because the majority's adoption of this duty of inquiry is inconsistent with our adversarial system of justice, I concur only in the judgment. I also note the majority cites no statute, case, or regulation that imposes such a duty of inquiry on the district court.

Our system of justice is an adversarial one. "What makes a system adversarial rather than inquisitorial is not the presence of counsel," but "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the bases of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 8 (1991). Consistent with this principle, our court has never required district court judges develop—by interrogation of witnesses—the record on which they render judgments; instead, we require district court judges to make specific findings based on the evidence that the parties place in the record.[1]

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[1] There is one exception to the principle I have stated: when the question before the court is whether a party has received adequate representation, there is reason to distrust the parties' ability (or

Thus, for example, Federal Rule of Criminal Procedure 23 states that a district court can excuse a seated juror in a criminal case, but only if the district court finds that "good cause" exists. And when the record does not support a district court's finding that good cause existed, we do not hesitate to tell it so. *See, e.g., United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) (finding district court erred in dismissing juror when record showed reasonable possibility that juror's view of merits of case were basis of removal). But we have never held that a district court has any duty to interrogate jurors to develop that record, or that it would be reversible error for a district court to accept the parties' submission that the record was sufficient for it to rule.[2]

Nor should we. District court judges are "in the best position to evaluate the jury's ability to deliberate," and should be accorded the widest latitude in determining

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motive) to develop a full record. Thus, for example, a court cannot accept a guilty plea unless it has "determine[d] that the defendant understands" the rights he gives up by pleading guilty, thereby ensuring that a defendant who waives his right to trial is doing so in knowing and voluntary fashion. Fed. R. Crim. P. 11(b). Here, by contrast, the majority does not argue (and there is no reason to think) that the parties are incapable or unwilling to develop the necessary record by interrogation of the witnesses.

[2] Of course, much as an appellate court judge may choose to research a legal point not fully presented in the parties' briefs, a trial court may choose to participate in development of the record, by (for example) asking questions itself of jurors accused of improper conduct. Indeed, district court judges often question jurors accused of improper conduct to determine whether the juror may continue to serve, in part because a party's lawyer may not be keen to ask hard questions of a juror about to decide his client's case. Salutary though this practice may be, no court has ever made it *mandatory* in the manner of today's majority opinion.

how to make that evaluation. *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007) (quoting *United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998)). Indeed, this court has, for more than three decades, considered trial courts "uniquely qualified" to evaluate the possibility that a juror has been biased. *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981). Despite this presumption, the majority creates a new, unnecessary requirement that will hinder the ability of district court judges to manage the jury as they see fit.

In sum, the majority's rule is inconsistent with both basic principles of adversarial procedure and well-founded principles of appellate deference to trial court judgments. Because I would not mandate any *sua sponte* inquiry by the district court into a matter that the parties are well-equipped to investigate themselves, I concur only in the judgment.

**APPENDIX B**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**BUTTE DIVISION**

---

No. CV-11-00036-BU-RFC-RWA

---

Rocky Dietz, Plaintiff

*v.*

Hillary Bouldin, Defendant

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April 18, 2013

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JUDGMENT IN A CIVIL CASE

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict finding FOR the PLAINTIFF and AGAINST the DEFENDANT in the amount of $15,000.00.

DATED: April 18, 2013.

Tyler P Gilman
Clerk of Court

By: /s/ Erica Larson
Deputy Clerk

# APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

---

No. CV-11-00036-BU-RFC-RWA

---

Rocky Dietz. Plaintiff

*v.*

Hillary Bouldin, Defendant

---

April 17, 2013

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## VERDICT FORM

We, the jury, duly impaneled, find for the Plaintiff Rocky Dietz in the above-entitled action and unanimously assess his damages at the sum of $ -0- (zero)

DATED this 17 day of April, 2013.

/s/_____
Jury Foreperson

## APPENDIX D

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF MONTANA
## BUTTE DIVISION

---

No. CV-11-00036-BU-RFC-RWA

---

Rocky Dietz, Plaintiff

*v.*

Hillary Bouldin, Defendant

---

April 17, 2013

---

### TRANSCRIPT OF PROCEEDINGS

Before: Richard W. Anderson, US District Court Judge.

APPEARANCES

FOR THE PLAINTIFF

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FOR THE DEFENDANT

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* * * * *

[251] (Whereupon, the court recessed pending return of the jury. Thereafter, the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: We have a verdict, I understand, counsel.

So, will you bring the jury in.

(Whereupon, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: We are in the courtroom now with this court.

The jury has filled the box. You have sent us a note that you have reached a verdict. Is that correct; jurors?

THE FOREPERSON: That's correct, Your Honor.

THE COURT: Is it your unanimous verdict?

THE FOREPERSON: That's correct, Your Honor.

[252] THE COURT: Very well. I wonder if the clerk would go take the verdict form. And read the jury's verdict into the record omitting the title, court and cause.

THE CLERK: "We, the jury, duly empaneled, find for the Plaintiff, Rocky Dietz, in the above-entitled action and unanimously assess his damages at the sum of zero.

Dated this 17th day of April, 2013, signed by the jury foreperson.

THE COURT: Counsel wish the jury polled?

MR. ANGEL: No, Your Honor.

MR. BEAUDETTE: No, Your Honor.

THE COURT: Very well. That concludes the matter then, jurors. You have the Court's thanks for this performance of your civic duty, spent away from your jobs and your homes for very little thanks and for little compensation. It's an important thing you've done, however; and the Court appreciates your time. You're free to go. The jury's discharged.

(Whereupon, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: Court is in recess.

MR. BEAUDETTE: Thank you.

MR. ANGEL: Your Honor, I have a post-trial motion I'd like to make.

THE COURT: You'll have plenty of time for post-trial motions. You don't have to make them right now.

[253] MR. ANGEL: Okay. Thank you, Your Honor.

THE COURT: I would not be surprised.

MR. ANGEL: Thank you, Your Honor. I appreciate it.

(Whereupon, a recess was held. Thereafter, the following proceedings were held with all counsel present outside the presence and hearing of the jury:)

THE COURT: Okay, the record will show that counsel and the Court are in chambers, having just stopped the jury from leaving the building when I had told them they were dismissed. The reason for this was, in a fairly quick second thought and reviewing the verdict at zero dollars not being legally possible in view of stipulated damages exceeding $10,000, I wanted to talk to counsel about the best way, in their opinion, that we should proceed. I suggested the alternatives of extensive post-trial motions, being motions for new trial, which very likely would be granted. Or sending the jury back for continuing deliberations at this time in the hopes we could avoid doing this twice, telling them that their verdict is not legally permissible, and to resume their deliberations. In which case, it's now 25 minutes to five. We would call them back tomorrow morning at 9:00 for that purpose.

I'll begin by listening to Plaintiff's counsel as to his suggestions.

MR. ANGEL: Thank you, Your Honor. It's Plaintiff's position that the – obviously, the verdict is contrary to the undisputed evidence and the law. The jury did not follow the law. I [254] mean, I would object to this jury ruling on the case in light of that fact, for obvious reasons.

THE COURT: You want another chance.

MR. ANGEL: I think that this jury, having been dismissed, I saw them talking with Erika. They obviously have some inabilities to follow the Court's instructions. And I don't feel like we'd get a fair and impartial verdict at this point given what they've done to this point.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, I would ask that the Court keep the jury, tell the jury that their verdict is

impermissible under the law and the evidence, that we had stipulated and agreed to, you know, all the medical expenses being related, and that a verdict of zero is not within the law and cannot be accepted by the Court. And have this jury reach a new verdict based upon following the law.

THE COURT: You said, Mr. Angel, you saw jurors talking to Erika. That would be the clerk of the court.

MR. ANGEL: That's what I thought I saw, yes.

THE COURT: Are you suggesting somehow or another there was discussion about the case?

MR. ANGEL: No, not at all. But it's my understanding, once they've been released, I'm not sure the Court – I'm not sure it's appropriate to recall them back. And it seems to me that the verdict was the product of some prejudice. And I don't know how we would get rid of that. I think they would just come back with the [255] next lowest number they could think of where the Court would allow it to stand. And I don't think it's appropriate under the circumstances.

THE COURT: Well, this is a jury you picked. What if the Defendant would stipulate that the verdict could be increased to the $10,000 number? I don't know if they're prepared to do that; but if they did, what would be your reaction to that?

MR. ANGEL: I would still not want this jury sitting in trial of that, given –

THE COURT: Well, it would not. That would end it. I'm talking about that stipulation.

MR. ANGEL: Oh. We actually had a few discussions afterwards; because we could all see there's a lot of work

coming. But I don't think there's any change in position between the Plaintiff and Defendant.

THE COURT: Well, I did dismiss the jury on the record. But none of them had left the building. Had they even left the floor?

THE CLERK: There was one that left the building to go get his hotel receipt –

THE COURT: Okay.

THE CLERK: – and to come bring it back.

THE COURT: All right. I hate to just throw away the money and time that's been expended in this trial, not only by the Court but by the parties, when we all know that a new trial will be [256] mandatory if I do that, if I dismiss the jury. Clearly, the verdict somehow is the result of misapprehension on the part of the jury as to their duties in setting damages. We have stipulated medical bills of approximately $10,000 that are agreed, by all, are payable and should be in the verdict. Then we have undisputed general damages in some amount, the amount not quantified because the Defendant has agreed that some physical harm resulted, though there is strong disagreement as to the extent of that harm. The jury must award something for that over and above the agreed medical bills. They must. Would you agree, defense counsel?

MR. BEAUDETTE: I would agree, Your Honor.

THE COURT: And the Court could accept no verdict which does anything less. I'm going to send the jury back into deliberations. I'm going to tell them exactly that. That the verdict has a floor and must be the amount of the medical bills plus a reasonable amount under the Court's instructions for general damages, which is an

amount that is totally within their discretion but it must be something over and above $10,136. And then I'll tell them they can come back tomorrow morning to reach that decision. I'll have them come in at 9:00. And I suppose whatever they do, we'll still have motions and arguments post-trial. But at least I will not have just arbitrarily, without much consideration, thrown out the result of all the work we've gone through getting to this point. So, that's what we're going to do.

MR. ANGEL: And my objection is noted for the record, I [257] take it. I don't have to say any –

THE COURT: I think your position is noted for the record, yeah.

MR. ANGEL: Okay, thank you, Your Honor.

THE COURT: And we will presume that you object.

MR. ANGEL: Yes, Your Honor.

THE COURT: And stand on your request for a second bite at the apple. And we'll see what they do tomorrow.

MR. ANGEL: Understood, Your Honor.

THE COURT: All right.

MR. BEAUDETTE: Thank you, Your Honor.

(Whereupon, the Court, counsel and the parties returned to the courtroom, and the jury then entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: The record will show, even though the jury was discharged, we're back in open court with the jury in the box, all seven of you, the Court having

called them back moments after having dismissed them. And I did so. I want to tell you what's going on here. I did so because, upon rather quick reflection upon your verdict, I came to the conclusion that it was not possible to reach that verdict under the law and the facts of this case.

I'll tell you why. There was never any dispute, it was admitted from the beginning in this case, that the medical bills of $10,136.75 were caused by this collision and were due and payable. [258] It doesn't matter by whom or to whom. That was the admission in the case. So, the verdict as a starting point had to be at least $10,136.75. The verdict could not fly in the face of that undisputed evidence.

Secondly, it was admitted by the Defendant that some injury occurred in this accident. It was contested hotly that the injury was anywhere near as severe as contended by the Plaintiff. But nonetheless, it was admitted that some injury happened. That being the case, some compensation for that undisputed injury had to be awarded. Had to be, under the law. That being the case, your verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury which you find was inflicted. And remember, there is a stipulation in this case that something happened, some injury was done, some damage occurred. It was never quantified, and that's where a fair jury comes in.

As a result of all this, unless something has happened in that brief interlude between your discharge a bit ago and now that would have reflected upon your deliberations outside the jury room, I'm going to call you back into session tomorrow morning and have you reconvene for the purpose of reaching another verdict. I cannot accept the verdict you've reached.

Now, before doing that, I'm going to ask any of you, did anything occur during the . . the few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers?

[259] JURY PANEL VOICES: No, sir. No.

THE COURT: Did we get everybody stopped in time for that not to occur?

JURY PANEL VOICES: (Heads nod) Uh-huh, yes.

JUROR: I didn't. You did. Most of us were just outside the door here. And there was only two that went down the –

THE COURT: That's what I tried to do. I understand one juror had gone to the first floor and it was maybe to get a hotel receipt.

JUROR: I did that, but I didn't talk to anybody.

THE COURT: You didn't talk to anyone. So, in terms of you being contaminated by any outside information, that is not a factor.

JUROR: No.

JURY PANEL: No.

THE COURT: Well, I do apologize for the . the confusion. But understand this, if I don't do what I've done, I will have no choice but to grant a new trial to the Plaintiff, bring us all back together again on a different day, not you, in front of a new jury, and go through this all over again in front of a different panel. And so, I concluded that the only way I could salvage the work and the expense that's gone on to this point is to bring you back and ask you to start over with clarifying instructions as to what the minimums are that you may do.

JUROR: (Raises hand)

[260] THE COURT: Yes, sir.

JUROR: May I ask? Had you said that upon sending us into the room, you would have had a different answer.

THE COURT: I suspect that. I suspect that would be true.

JUROR: It was wide open, and we did not know how to determine that.

THE COURT: It's partly – I accept the blame for part of this. It's also up to counsel to formulate their stipulations so that perhaps they're more clearly defined than they were in this case.

JUROR: Was our note not clear, Your Honor?

THE COURT: Your note was clear. It doesn't matter whether those bills were paid or by whom or remain unpaid. None of that matters. The fact that matters is that they were incurred. They're stipulated as reasonable and caused by this collision. That's all that matters.

JUROR: That's what we wanted to know, but we never got clarification on that.

THE COURT: Well, you asked who paid the bills or are they paid. That was the question. And I answered that question. It's not germane to your deliberations. Now, if you'd asked the other question, I would have answered the other question. But you didn't ask it. Just unfortunate confusion I think on everybody's part. And I accept the blame, to start with, for not making this [261] more clear before you went back into that room for the last time. But now I hope I have made it clear. And I'm going to ask you, though, are there any other questions

before we recess for the evening subject to coming back tomorrow morning?

JUROR: Would it be possible to meet yet this afternoon so we don't have to come back tomorrow?

THE COURT: We're not equipped for night session. The security goes home. And it would be possible as far as I'm concerned, but I can't commit everybody else, I'm sorry. And you have some distance to travel, I know. I'm sorry. No. It's not possible. Anything else?

JURY PANEL: (No response)

THE COURT: Okay. Well, 9:00 tomorrow morning, and we'll see you after you try again. Do you understand? Do you think you understand what the problem is? And what your duty is?

JURY PANEL: (Heads nod)

THE COURT: All right. Again, my apologies. Good night.

THE CLERK: All rise.

(Whereupon, court adjourned until the following day.)

## APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

---

No. CV-11-00036-BU-RFC-RWA

---

Rocky Dietz, Plaintiff

*v.*

Hillary Bouldin, Defendant

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April 18, 2013

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**TRANSCRIPT OF PROCEEDINGS**

Before: Richard W. Anderson, US District Court Judge. Butte, Montana.

APPEARANCES

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FOR THE DEFENDANT

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* * * * *

[2] BE IT REMEMBERED THAT this matter came on regularly for jury trial at the time and place and with the appearances of counsel hereinbefore noted before Ann Y. Wayrynen, a Notary Public for the State of Montana.

The following proceedings were held in chambers:

THE COURT: I understand the plaintiff has a motion or motions. We are in chambers with both counsel present.

Mr. Angel you may proceed.

MR. ANGEL: The plaintiff at this time would make a motion for a mistrial, and there's three reasons for that.

I did a little research, and it seems to me that the discharge of the jury and the effect of the sequestration on that is an issue that I think can't be cured. That's one ground for a mistrial.

There's also the issue of submitting the same question to the jury that they've already deliberated on and come to a verdict. It's the plaintiff's position that it's improper to ask them to amend that answer because we don't have an inconsistent verdict hear [sic]. We just have an unlawful verdict.

And the third basis is that the jury did reach an unlawful verdict, which is certainly an indication and per-

haps even proof that they did not follow the evidence or the law, and so we are limited by some sort of prejudice. There were two violations of orders in limine. I think it's just evidence that there is not a fair and impartial jury there based on [3] that. So I just wanted to make a record so there is no issue of waiving those objections.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, I haven't done any research, and I didn't know what he was going to be moving for this morning.

With regard to the jury being discharged, the Court released the jurors. They went back to the jury room and made it out into the hallway. I think one of them made it down to the first floor. And, then, they were called back. We went back into court, back into session. The Court asked the jurors if any of them had talked to anybody, discussed anything with the case; and, they all indicated, no, they had not.

I don't think there is any issue with the jury or any evidence of anything coming in to the jury between the time period between when they were released and when they were called back by the Court.

With regard to submitting the same question to the jury, I don't think that is going to be an issue. In the discussion in court with the jury, I believe their indication was they didn't understand the instructions and that they had to award the past medicals. I think their question that they sent out and the discussion the Court had with them when they were recalled indicates that they were a little confused as to what they had to do.

[4] And, with regard to the unlawful verdict, I believe that that has been cured by the Court's additional instructions to the jury as to what they have to award in

this case based upon the admissions that have been made.

THE COURT: All right. Well, the issue is clear. Your contention has been preserved, Mr. Angel.

MR. ANGEL: Thank you.

THE COURT: I am going to deny the motion for a mistrial.

What we are going to do, counsel, on this very topic is we are going to give them another verdict form with another blank and it's going to be exactly the same as yesterday's, except on the title it's going to be called Verdict No. 2. We will keep Verdict No. 1 in the record for everybody's future reference, and Verdict No. 2 will supplement it. And if there is a judgment entered, it will be entered pursuant to Verdict No. 2.

Then, I imagine we'll all be looking forward to post-verdict litigation.

MR. ANGEL: Thank you.

MR. BEAUDETTE: Thanks, Your Honor.

(Whereupon, court stands in recess during jury deliberations)

The following proceedings were held in open court:

THE COURT: Please seated. Bring in the jury, if you would. [5] The record will show that we are in open court. Counsel, the jury has announced that they have reached a verdict, Verdict No. 2 in this case. And all seven of the jurors are here this morning for that purpose, and they are in the jury box.

Ladies and gentlemen, is that correct? Have you reached a verdict?

JURY FOREPERSON: Yes, Your Honor.

THE COURT: I wonder if you would give it to the clerk of court, please, who will now read the jury verdict into the record.

CLERK OF COURT: We, the jury duly empanelled, find for the plaintiff, Rocky Dietz, in the above-entitled action and unanimously assess his damages at the sum of $15,000. Dated this 18th day of April, 2013, and signed by the jury foreperson.

THE COURT: Is that your verdict, ladies and gentlemen?

(All jurors answer affirmatively.)

THE COURT: Is it a unanimous verdict?

(All jurors answer affirmatively.)

THE COURT: All right. Do either counsel wish the panel polled?

MR. ANGEL: No, Your Honor.

MR. BEAUDETTE: No, Your Honor.

[6] THE COURT: Well, that is a verdict which the Court can accept, ladies and gentlemen.

This has really been unusual for me, as well as for you. Sometimes we, as lawyers and judges, take the requirements of the law as to what a jury must and must not do for granted because we are so familiar. And we do forget, maybe this is a first experience for you folks, and we are not as careful as we ought to be in explaining what to us is obvious. For that I apologize.

The delay and your need to return this morning instead of going home for good last, I accept the blame for that.

I have good news. Because you have served in this case, you will not be called again. Your names will be removed from the jury pool. And at least until a new jury pool is created, you are off the hook, so to speak. And a new jury will be created later this year, a new pool. If for some unimaginable reason any of you are included in that jury pool and are called for further service, all you have to do is advise the clerk of court that you just served in April of 2013 and you will be automatically excused. So this will not happen again.

Beyond that, I hope you at least found the experience interesting, and you have a better idea of what we who work in the courts do or try to do when we go through day after day.

You've done your duty. You have done it well. You have listened carefully, and I'm satisfied we have had a fair and [7] impartial jury, as well as an intelligent jury. Thank you very much.

Court is in recess.

* * * * *

## APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

---

No. CV-11-00036-BU-RFC-RWA

---

Rocky Dietz, Plaintiff

*v.*

Hillary Bouldin, Defendant

---

April 18, 2013

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VERDICT FORM NO. 2

We, the jury, duly impaneled, find for the Plaintiff Rocky Dietz in the above-entitled action and unanimously assess his damages at the sum of $ 15,000.00

DATED this 18 day of April, 2013.

/s/
Jury Foreperson

DEC 1 - 2015
OFFICE OF THE CLERK

No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ,

*Petitioner*,

v.

HILLARY BOULDIN,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the trial court may recall the jurors for additional deliberations after the jury had been discharged, some of them had left the courtroom and one had made it to the first floor (from the second floor) when juror testimony established none of them had been subjected to outside influences during the time of discharge.

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## STATEMENT

This case addresses the issue of whether a trial court may recall the jury for additional deliberation moments after it had been discharged when the evidence established no juror had been subjected to outside influences during the momentary period of discharge. This Court should deny the Petition on four grounds: (1) in March of 2015, this Court denied the Petition for a Writ of Certiorari in *Jones v. Wagner*, No. 14-615, which presented the same issue, (2) an analysis of case law establishes there is no split of authority between the circuit courts, (3) any conflicting decisions from state courts of last resort are irrelevant to the question presented in this case, and (4) Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law.

1. Petitioner was involved in a motor vehicle accident on August 9, 2009, in Bozeman, Montana. Resp. C.A. Brf. 1. Petitioner alleged low back pain with pain radiating into his left leg as a result of the accident. Respondent admitted liability for the accident but disputed causation and damages. *Id.* The evidence showed Petitioner had a long history of pre-existing severe, intractable low back pain. *Id.* at 2, 5-8. Petitioner was injured in October of 2008 in an elevator accident which resulted in severe low back pain with intermittent pain radiating into his left leg. *Id.* at 2, 8. Petitioner treated for several months before being discharged because the facility had nothing further to offer. *Id.* at 10.

After the accident at issue, Petitioner received physical therapy for approximately six weeks which resulted in 85% improvement of his pain. *Id.* at 11.

Petitioner did not seek any further treatment until the summer of 2010 when he received an epidural steroid injection and reported complete relief of his leg pain and significant reduction of his low back pain. *Id.* at 11-12. Petitioner did not seek any further treatment until July of 2011 when he underwent a few physical therapy visits. *Id.* at 13. Petitioner did not seek any further treatment prior to trial.

2. At trial, Petitioner's treating provider opined that his MRI findings were not related to the accident, the accident aggravated his pre-existing condition, did not cause his low back pain but caused his left leg pain. *Id.* at 13. Respondent's expert testified Petitioner's pre-existing condition was aggravated by the accident, his low back pain returned to baseline after the accident and his left leg pain was intermittent before the accident but ongoing after the accident. *Id.* at 3, 13-14. Prior to trial, Respondent admitted Petitioner was injured in the accident and stipulated to past medical expenses of $10,136. The only issue for trial was future damages. Pet. App. 2a.

During deliberations, the jury sent a note asking if Petitioner's medical expenses had been paid and, if so, by whom. Pet. App. 2a-3a. The jury's note resulted in the court speculating as to the meaning of the note:

> What I'm wondering – Let's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the

> argument and instructions, that their verdict may not be less than that amount?

Pet. App. 3a.

Respondent's counsel believed he made it "crystal clear" that they jury had to award at least the stipulated amount. *Id.* The court stated that it regretted not including an instruction as a matter of law stating the medical expenses set the minimum verdict amount. Transcr. 248-49. However, the court was also concerned that "... for some people, that sets the ceiling. I would like to avoid that." *Id.* at 249. The court responded to the jury's note in writing, informing it the information was not germane to its verdict. Pet. App. 2a; Transcr. 249. Counsel for both parties were satisfied with the court's handling of the note. *Id.*

The jury returned a verdict for Petitioner but awarded $0. Pet. App. 3a, 22a, 24a. The verdict was in violation of Montana law since liability for the accident was admitted and the parties had stipulated the past medical expenses were caused by the accident. *Thompson v. City of Bozeman*, 945 P.2d 48, 52 (Mont. 1997)(... where a jury fails to award any damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside). Neither party wished to poll the jury. Pet. App. 25a. The court informed the jury the matter was concluded, thanked them for their time, told them they were free to go and discharged them. *Id.*

The court stopped the jury moments after discharging them and discussed the matter with counsel since the verdict wasn't legally possible given

the stipulated damages. Pet. App. 26a, 29a-30a. Petitioner's counsel stated that he saw the jury speaking with the court's clerk, *id.*, but later stated he "thought" he saw the jurors speaking with the clerk although he was not suggesting there was any discussion about the case, *id.* at 27a. The court decided to send the jury back for further deliberations with further instruction. *Id.* at 28a-29a; Resp. C.A. Brf. 21. The court instructed the jury there was never any dispute that Petitioner's medical bills were caused by the accident and were due and payable. Resp. C.A. Brf. 21. The court instructed the jury the verdict had to be at least the amount of the past medical expenses, *id.*, plus some additional amount as compensation for Petitioner's undisputed injury, *id.* at 22.

Before giving the case back to the jury for further deliberation, the court specifically asked the jurors if any of them had talked to anyone during the period of discharge. Pet. App. 31a; Resp. C.A. Brf. 22. The jurors stated they had not talked with anyone. One juror stated that most of them were just outside the courtroom door. The juror who made it down to the first floor stated that he did not speak with anyone while discharged. The jury confirmed it had not been contaminated by any outside information during the discharge period. Pet. App. 31a; Resp. C.A. Brf. 22. After further deliberation, the jury returned a $15,000.00 verdict for Petitioner. Pet. App. 40a; Resp. C.A. Brf. 22. The court entered Judgment in favor of Petitioner in the amount of $15,000.00. Pet. App. 21a.

3. Petitioner appealed to the Ninth Circuit, *see* Pet. App. 1a-20a, where this was an issue of first impression, *id.* at 1a. The Ninth Circuit noted that a

jury is typically no longer an entity after it is discharged and its duties "are presumed to be at an end when its verdict has been rendered, received, and published." *Id.* at 6a (quoting *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926)). However, it was noted that several circuits have, in limited circumstances, recognized that a district court may recall a jury immediately after dismissal to correct an error in the verdict. *Id.* (citing *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994)). It was noted that these cases look at the totality of circumstances to determine whether the jurors had been exposed to outside influences during the time of discharge. *Id.* The Ninth Circuit found this line of cases appeared to originate from *Summers*. *Id.*

The Ninth Circuit contrasted the *Summers* line of cases with *Wagner v. Jones*, 758 F.3d 1030 (8th Cir. 2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 1529, 191 L. Ed. 2d 558 (2015), and a handful of state courts, all of which had adopted a bright line test prohibiting recall once the jurors leave the courtroom. *Id.* at 9a. Although the Ninth Circuit recognized some advantages of a bright line rule, *id.* at 10a, it adopted the totality of the circumstances approach and held that "in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a. The Ninth Circuit concluded the

jury had not been subjected to outside influences and affirmed. *Id.* at 13a-17a.

## REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States provides, in relevant part:

> **Rule 10. Considerations Governing Review on Certiorari**
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; ...,
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law

Petitioner argues this case presents a recognized circuit conflict, Pet. 2, 8, and that state courts of last resort are deeply divided on this issue, *id.* at 8. Contrary to Petitioner's argument, the Court should

deny the Petition. First, this Court recently denied a petition raising the same issue. Second, there is no conflict between the circuits which would merit this Court's review. Third, the decisions of state courts are irrelevant to the question presented. And fourth, Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law.

**1. This Court recently denied the Petition for a Writ of Certiorari in *Jones v. Wagner* which presented the same issue**

In *Jones*, Jones filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Pet. for Writ., *Jones, supra*. *Jones* presented the same issue as the case at bar. *Id.* at *5. Jones argued the Petition should be granted, *inter alia*, because the Eighth Circuit's decision created a conflict among the circuit courts. *Id.* at *19. Jones argued the Eighth Circuit's decision conflicted with decisions from the First, Second, Third, Fourth, Sixth and Seventh Circuits. *Id.* at *20. After this Court requested a response from Wagner, it denied the Petition. If this issue was not one that needed to be addressed in *Jones*, there is no additional reason to address it in the case at bar.

**2. There is no circuit split as alleged by Petitioner**

"The 'single most important' factor for granting certiorari petitions ... is a split within the circuits that have considered the issue below " *Allapattah Servs. v. Exxon Corp.*, 362 F.3d 739, 746 (11th Cir. 2004)(Tjoflat & Birch, JJ., dissenting)(citing *Sanford Levinson, Book Review: Strategy, Jurisprudence, and Certiorari.*

*Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L. Rev. 717, 726 (1993)(quoting *H.W Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991))).

Petitioner argues the Ninth Circuit's decision deepened a conflict among the circuit courts. Pet. 8. However, an analysis of the circuit court decisions shows there is no split between them. The seminal case on this issue is *Summers*, which announced the general rule: "After a verdict has been rendered, and the jury, after being discharged, have separated, the jury cannot be recalled to amend their verdict. But the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers*, 11 F.2d at 586 (quoting Abbott's Trial Brief, Criminal Causes, p. 730). *Summers* found that whether a jury is discharged depends on the actions of the jury more than the court's announcement of discharge. *Id.* The court provided:

> ... [The jury] may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

*Id.*

*Summers* held the jury could be recalled, further instructed and asked to further deliberate since the

jurors remained in the jury box, had spoken to no one and no one had spoken to them during the period of discharge. *Id.* at 586. *Summers* did not set forth any guidance as to when a jury remains an undispursed unit within the control of the court since the jury never left the jury box. Thus, the Fourth Circuit's decision in *Summers* is not in conflict with the Ninth Circuit's decision since it does not identify the boundaries of when a jury is considered an undispersed unit within the control of the court.

The Second Circuit looked at this issue in *Rojas*. 617 F.3d at 676-77 The jury found Rojas guilty of conspiring to possess, with intent to distribute, more than five grams of cocaine base. *Id.* at 671. In reading the verdict in open court, however, the deputy read "cocaine" but omitted "base" *Id.* at 673. The error was discovered after the jury had been polled, discharged and had returned to the jury room. *Id.* Over objection, the court brought the jury back to the courtroom and had the deputy re-read the verdict. *Id.* On appeal, the Second Circuit quoted the general rule set forth above from *Summers*. *Id.* at 677 The court went on to provide:

> It is significant that, although the jury had technically been declared "discharged" by the court, it had not dispersed. The jurors were therefore not exposed to "outside factors," which might "render[] the reliability of any poll on recall problematic." *United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994). In accord with the *Summers* court, the Seventh Circuit has held that "[w]hen a jury remains as an undispersed unit within the control of the court

> and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled." *Id.* at 1214. Similarly, we hold that the jury in this case "retain[ed] its function[]," *Summers*, 11 F.2d at 586, and that it was proper to return it to the courtroom for a re-reading of the verdict form and for a re-polling.

*Id.* at 678.

Even though the *Rojas* jury had left the courtroom and returned to the jury room, it was still considered undispersed and under the court's control without exposure to outside influences. Thus, it was proper to recall the jury. *Rojas* relied on *Summers* and quotes from *Marinari* in support of its holding, explicitly stating the decisions are in accord. This runs contrary to Petitioner's argument that the Fourth Circuit's decision in *Summers* is in conflict with decisions from the Second, Third and Seventh Circuits. Pet. 8. Further undermining Petitioner's argument is the Third Circuit's decision in *Figueroa*.

Figueroa was indicted on four counts: (1) distribution of heroin, (2) distribution of cocaine, (3) carrying a firearm during a drug trafficking offense, and (4) possession of a firearm by a felon. *Figueroa*, 683 F.3d at 71. At trial, the fourth count was bifurcated from counts 1-3. *Id.* The jury reached a verdict on counts 1 and 2 but deadlocked on count 3. *Id.* at 71-72. The verdicts were published and the jury was discharged. *Id.* at 72. Immediately on their exit, the prosecution asked the jury be held so count 4 could be addressed. The judge sent a court employee to hold the jury. *Id.* at 72. The judge ultimately recalled the

jury for consideration of count 4. The judge charged the jury on count 4 and it returned a guilty verdict. *Id.*

On appeal, the Third Circuit noted the pivotal inquiry is whether the jurors became susceptible to outside influences. *Id.* at 73. The court provided:

> "When a jury remains as an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled." *Marinari*, 32 F.3d at 1213 (citing *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926)); see also *United States v. Rojas*, 617 F.3d 669, 678 (2nd Cir. 2010)("It is significant that, although the jury had technically been declared 'discharged' by the court, it had not dispersed."). As the Fourth Circuit long ago stated, "the mere announcement of [the jury's] discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers*, 11 F.2d at 586 (citing Austin Abbott, A Brief for the Trial of Criminal Cases 730 (2d ed. 1902)).

*Id.*

The Third Circuit concluded the district court retained control of the jury at all times after discharge, the jury had not dispersed and the jury had not interacted with any outside individuals, ideas or coverage of the proceedings. *Id.* "Thus, the fact that the jury was momentarily released did not subject them to outside influence." *Id.* The Third Circuit held there was no error in reconvening the jury. *Id.* *Figueroa* shows uniformity of the rule adopted by the Second, Third, Fourth and Seventh Circuits and notes

the pivotal inquiry is whether the jurors have become susceptible to outside influences.

Susceptibility to outside influences addresses the issue of the protective shield surrounding the jury while hearing the case and deliberating. This protective shield aims to prevent jurors from being influenced by outside factors. *Id.* When the jury is discharged, the concern regarding outside influences ends because the proceedings and deliberation process can no longer be affected. *Id.* (citing *Marinari*, 32 F.3d at 1214 ("Of course, after discharge, the jurors are quite properly free to discuss the case with whomever they choose.")). The fact that the court removes the "protective shield" upon discharge does not mean the jury is immediately subjected to outside influences.

The Seventh Circuit addressed this issue in *Marinari*. The jury found Marinari guilty of conspiracy to distribute marijuana. *Marinari*, 32 F.3d at 1210. The verdict was read into the record and the judge instructed the jurors to return to the jury room. *Id.* at 1212. After the last juror exited the courtroom, Marinari requested the jury be polled. The judge denied the request while the jury remained in the jury room. Marinari moved for a new trial alleging the court erred in refusing to have the jury return to the courtroom to be polled. *Id.*

The resolution of Marinari's motion hinged on whether the jury had been discharged and dispersed. The court noted that a jury is undischarged and may be recalled when it remains an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others. *Id.* at 1214 (citing *Summers*, 11 F.2d at 586). The court also

noted that "[u]ntil the jury is actually discharged by separating and dispersing (not merely being declared discharged), the verdict remains subject to review. *Id.* (citing *Putnam Resources v. Pateman*, 958 F.2d 448, 459 (1st Cir. 1992)).

The court noted a long line of cases which demonstrated the practical reason why a verdict becomes final upon separation and dispersal of the jury - it is at that time that the jurors are exposed to outside contacts. *Id.* The Seventh Circuit concluded the jury had remained sequestered in the jury room awaiting security escort to the parking lot. *Id.* at 1215. The jurors had not dispersed, they remained untainted by any outside contact and they continued to exist as a judicial body under the control of the court. *Id.* The Seventh Circuit held it was error for the district court not to poll the jury under these facts. *Marinari* shows the Seventh Circuit applies the same analysis as the Second, Third, and Fourth Circuits.

In its decision below, the Ninth Circuit held that in limited circumstances, a court may recall a jury shortly after it has been discharged to correct an error in the verdict, but only after the court inquires to determine that the jurors were not exposed to any outside influences that would compromise its ability to fairly consider the verdict. Pet. App. 12a. The court's decision was supported by *Summers*, *Figueroa*, *Rojas* and *Marinari*. *Id.* at 6a-9a. The court contrasted the rule adopted in these cases with the Eighth Circuit's decision in *Wagner*, which "adopted a restrictive bright-line rule prohibiting recall once the jurors have left the confines of the courtroom." *Id.* at 9a. The Ninth Circuit noted a bright line rule has some advantages

but fails to adequately address the issue of outside influences. *Id.* at 10a-11a. The Ninth Circuit found the rule it adopted struck the proper balance between considerations of fairness and economy. *Id.* at 11a. Although the Ninth Circuit contrasted its holding with *Wagner*, an analysis of *Wagner* shows there is no split of authority on this issue.

Wagner asserted two constitutional claims at trial, political discrimination and equal protection. *Wagner*, 758 F.3d at 1032. During deliberations, the jury sent a note stating it was unable to reach a unanimous verdict for either party. *Id.* The judge convened the jury in the courtroom to question it about the note. *Id.* at 1032-33. Each juror confirmed his or her view as to the state of deliberations. *Id.* at 1033. The judge declared a mistrial, asked the jurors to complete and return a post-trial assessment and thanked them for their service. The judge excused the jurors and they retired from the courtroom at 4:35 p.m. *Id.*

After discharging the jury, the judge reassembled the previously dispersed jurors in the courtroom at 4:37 p.m. The judge asked if the jury was deadlocked on one or both counts. The foreperson informed the court the jury had reached a verdict on Count I but not Count II. The judge amended his previous mistrial ruling, limiting it to Count II, accepted the signed verdict on Count I and discharged the jury. Wagner moved for a new trial arguing the judge did not have the authority to reconvene the jury and accept the verdict after declaring a mistrial. *Id.*

*Wagner* held that, "in a case such as the present one, where a court declares a mistrial and discharges the jury which then disperses from the confines of the

courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts." *Id.* at 1035. Critical to the court's holding is the fact that there was no evidence of the jurors' conduct during the time of discharge. "From the time the magistrate judge discharged the jury and the members dispersed from the courtroom, until the time the magistrate judge reassembled them in the courtroom, we have no record of the jury members' location, supervision, contacts, communications or conduct, either as individuals or as a group." *Id.* at 1033, n. 5. The court found the *Summers* rule and its variations become unworkable when there is no evidence as to juror security and conduct after discharge, which would force the court to speculate as to the undefined limits of the protective shield. *Id.* at 1035-36.

*Wagner*, like *Summers*, *Rojas*, *Figueroa*, *Marinari* and the Ninth Circuit's decision below, allows a jury to be recalled, in limited circumstances, once discharged. Thus, all the circuits are following the same rule. *Wagner*, however, had to narrow its ruling and adopt a bright line rule since it had no evidence to determine whether the jury was subjected to outside influences during the time of discharge. This prevented the Eighth Circuit from following the same analysis as the other Circuits since it had no evidence to analyze. The Eighth Circuit had to adopt the bright line rule by default. The fact that *Wagner* adopted a bright line rule at the courtroom door based on the facts before it does not create a conflict between the Circuits. They all follow the same rule, that a jury may be recalled, in limited circumstances, once discharged.

The *Wagner* decision is also distinguishable from the *Summers* line of cases in that the court had declared a mistrial before discharging the jurors. *Id.* at 1033. Even *Wagner* recognized this distinction, noting that it was not entirely convinced the other circuits would condone recalling a jury to question and re-poll it after a mistrial had been declared. *Id.* at 1036, n. 10. *Wagner* is limited to the situation where a mistrial has already been declared. Thus, it does not create a split of authority between the Circuits.

### 3. State court decisions are irrelevant to the question presented

Petitioner argues that state courts of last resort are intractably divided on the question presented, with the clear majority of state courts to decide the issue adopting a bright line rule similar to the Eighth Circuit's. Pet. 14. "As matters currently stand, therefore, judges across the country are subject to inconsistent rules concerning the circumstances under which they are permitted to recall discharged jurors." Pet. 15. This argument is obviously being asserted to convince this Court that a significant conflict exists which can be remedied if this Court grants the Petition. Whether state courts of last resort have adopted differing rules, however, is irrelevant to the question presented in this case.

Unless dealing with matters governed by the U.S. Constitution or an Act of Congress, a federal court sitting in diversity jurisdiction must apply the law of the state, whether such law is declared by the Legislature or the state's highest court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 1194 (1938). Congress has no power to declare

law for any state and the Constitution does not confer any such power on the federal courts. *Id.* Although federal courts apply a state's substantive law, they apply federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 1141, 14 L. Ed. 2d 8, 13 (1965); *see* 28 U.S.C. § 2072 (Supreme Court shall have the power to prescribe general rules of practice and procedure for cases in the United States district courts (including proceedings before magistrate judges) and courts of appeals). Matters related to the selection and conduct of the jury are controlled by federal procedural law, 28 U.S.C. §§ 1861 et seq., including the judge's ability to reject a jury's verdict and have it continue deliberations under Fed. R. Civ P 49(b). *Bahamas Agric. Indus., Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1183 (6th Cir. 1975).

In the case at bar, its irrelevant if there are 50 different rules from the states since the question presented is one of federal procedure. If this Court granted the Petition and issued a ruling, it would only be binding on the federal courts and would have no effect on the law established in each state. A decision from this Court only effects a state court's ruling when the Constitutionality of the state's ruling is at issue. *See Brown v. Gunter*, 562 F.2d 122, 123-24 (1st Cir. 1977)(federal court has no power to challenge decision by Massachusetts Supreme Judicial Court that recall of jury after discharge was proper; it is accepted as correct rule of law in Massachusetts and only issue properly before federal court is whether such rule is consistent with requirements of the United States Constitution).

In *Brown*, the issue was whether the recall of the jury after discharge in a criminal case violated the Double Jeopardy Clause of the Fifth Amendment or the right to a jury trial guaranteed by the Sixth Amendment. *Id.* at 124. Although these Amendments are contained in the United States Constitution, the states are bound by them through the Fourteenth Amendment's Due Process Clause. *Id.* In the case at bar, the question presented does not raise a Constitutional issue that would have any effect on state court decisions. The question presented is strictly one of federal procedural law. Therefore, the fact that states may adopt different rules has no bearing on the question presented in this case.

Petitioner goes on to argue that the question whether a judge can recall a discharged jury directly implicates the "'fundamental guaranty of a fair trial' as embodied in the constitutional right to a jury trial as well as the broader right to due process." Pet. 16 (citing *State v. Nash*, 294 S.W.3d 541, 553 (Tenn. 2009) and *People v. Hendricks*, 737 P.2d 1350, 1358 (Cal. 1987)). These cases, however, do not support Petitioner's argument given the question presented in this case. *Nash* and *Hendricks* were criminal matters. *Nash*, 294 S.W.2d at 543; *Hendricks*, 737 P.2d at 1352. Therefore, the Fourteenth Amendment's Due Process Clause required the protections of the United States Constitution. The same protections are not at issue in the case at bar since we're dealing with a civil case. Therefore, the fact that state courts of last resort may have adopted conflicting rules of law does not have any relevance to the question presented in the case at bar.

**4. Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law**

Petitioner identifies the question presented as "[w]hether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case." Pet. (I). What Petitioner is really seeking from this Court is a reversal of the Ninth Circuit's decision based upon its application of the uniform rule of law to the facts of the case. This is evident from the Petitioner's arguments. "Under the Eighth Circuit's rule, this case would plainly have come out the other way, because the judge had discharged the jury and the jurors had left the courtroom before the judge recalled them." Pet. 10. "Under the Fourth Circuit's rule, therefore, this case plainly would have come out the other way as well, because the jurors had left the courtroom (and mingled with non-jurors outside the judge's control) before the judge recalled them." Pet. 11.

Petitioner hides this argument under the guise of a conflict between the circuits since a writ of certiorari is, by rule, rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Rule 10, Rules of the Supreme Court of the United States. This Court's reluctance to grant certiorari in cases in which the law is clear but allegedly misapplied to the facts was set forth in *Tolan*:

> I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e.g.*, this Court's Rule 10

> ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the ***misapplication*** of a ***properly stated rule of law***"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3) (10th ed. 2013)("[E]rror correction is outside the mainstream of the Court's functions and not among the 'compelling reasons' that govern the grant of certiorari").

*Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895, 903-04 (2014)(emphasis original)(Alito & Scalia, JJ., concurring).

The concurring opinion in *Tolan* further noted that circuit courts are regularly called upon to determine whether the evidence supports the grant of summary judgment and that "[t]here is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here." *Id.* at ___, 134 S. Ct. at 1868-69, 188 L. Ed. 2d at 904. In the case at bar, the Circuit Courts are all following the same rule, that a discharged jury may be recalled after it is discharged if it remains an undispersed unit, within the control of the court, with no opportunity to mingle with or discuss the case with others. The fact that the Ninth Circuit applied the rule in a broader fashion than the Eighth Circuit may apply the rule does not create a conflict; it creates an argument that the Ninth Circuit misapplied the properly stated rule of law. This Court should deny the Petition since it is only being asked to review the Ninth Circuit's application of the

law to the facts, not resolve a conflict in the law between the circuits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

No. 15-458

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

This case is a clear-cut candidate for certiorari. In his brief in opposition, respondent does not dispute that this case cleanly and squarely presents a question of substantial legal and practical importance which arises frequently in the lower courts, but which has only rarely come before this Court: namely, whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. Instead, respondent devotes most of his brief to arguing that the courts of appeals are not divided on the question presented.

That is a curious strategy, in light of the fact that both the Ninth Circuit (in the decision below) and the Eighth Circuit (in an earlier decision) have expressly recognized a circuit conflict. And those courts were plainly correct to do so. Contrary to respondent's contention, the six courts of appeals to have addressed the question are divided over the correct rule governing the recall of discharged jurors, not merely over how a supposedly uniform rule is applied in particular cases. And respondent cannot seriously dispute that the courts on the other side of the conflict "would decide the case differently" if presented with the facts here. Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

This is the rare case that comes before the Court at the certiorari stage with an expressly recognized circuit conflict and no asserted vehicle problems. Because this case readily satisfies the familiar criteria for further review, the petition for certiorari should be granted.

1. Respondent contends that "there is no split of authority" on the question presented, Br. in Opp. 14; instead, "all the circuits are following the same rule" but simply reach different outcomes, *id.* at 15. That contention is patently incorrect.

a. As a preliminary matter, the two courts of appeals at the heart of the circuit conflict have expressly acknowledged that conflict. In the decision below, the Ninth Circuit specifically contrasted the "case-specific" approach adopted by the Second, Third, and Seventh Circuits with the "bright-line rule" adopted by the Eighth Circuit in *Wagner* v. *Jones*, 758 F.3d 1030 (2014), cert. denied, 135 S. Ct. 1529 (2015). Pet. App. 9a. The Ninth Circuit considered and rejected the Eighth Circuit's rule and instead sided with the circuits adopting the contrary rule: namely, that a judge may recall jurors

after the judge has discharged the jury from service and the jurors have left the judge's presence. See *id.* at 11a.

Conversely, in adopting its "bright line rule" in *Wagner*, the Eighth Circuit considered and rejected the "case-specific" approach adopted by the Second, Third, and Seventh Circuits. *Wagner*, 758 F.3d at 1034-1035. The Eighth Circuit noted that courts were divided into "two camps" on the question presented. *Id.* at 1034.

Respondent simply makes no effort to reconcile his contention that the courts of appeals follow a "uniform rule of law" on the question presented, Br. in Opp. 19, with those courts' express recognition of a circuit conflict (much less their articulation of the competing legal standards). And just to be clear: contrary to respondent's assertion (*id.* at 19-21), petitioner's argument is that the Ninth Circuit adopted the incorrect legal standard in this case, not that it invoked the correct legal standard but simply misapplied it. The expressly recognized circuit conflict on the legal standard for recalling discharged jurors warrants the Court's review.

b. In fact, the Ninth Circuit was correct when it recognized that its decision in this case conflicts with the Eighth Circuit's decision in *Wagner*. In each case, the judge accepted the jury's disposition of the case and discharged the jury, and the jurors left the courtroom. See Pet. App. 25a; *Wagner*, 758 F.3d at 1033. The judge then recalled the jurors for further service in the case, struck the previously entered disposition, and entered a new, substantively different disposition based on further input from the reconstituted jury. See Pet. App. 30a, 38a; *Wagner*, 758 F.3d at 1033. In *Wagner*, the Eighth Circuit categorically held that a judge may not recall jurors to "render, reconsider, amend, or clarify" a verdict after the judge has discharged the jury and the jurors have left the courtroom. 758 F.3d at 1035. In this case, by

contrast, the Ninth Circuit held that a judge may recall jurors to reconsider or amend their verdict in such circumstances, as long as the judge is satisfied that the jurors "were not exposed to prejudicial influences" during the period of dismissal. Pet. App. 11a. It is hard to imagine a starker conflict.

Respondent attempts to distinguish *Wagner* on two principal grounds, neither of which is availing. Respondent first suggests that the bright-line rule the Eighth Circuit adopted in *Wagner* was "based on the facts before it," implying that the Eighth Circuit would follow a different rule in a case in which evidence existed to determine whether the jury was in fact "subjected to outside influences during the time of discharge." Br. in Opp. 15. But far from being "[c]ritical to the court's holding," *ibid.*, the fact that no evidence existed about the jurors' conduct during the period of discharge played no part in the Eighth Circuit's selection of the proper rule. See *Wagner*, 758 F.3d at 1034-1036. The Eighth Circuit unequivocally articulated the bright-line rule as a rule for all future cases, not just the particular case under consideration. See *id.* at 1035. Indeed, the Eighth Circuit explained that, under its rule, once the jury leaves the courtroom, "we *presume* mingling occurs" between the jurors and prejudicial outside influences, and it is of no moment "whether [a] juror actually had such [an] encounter." *Id.* at 1035 & n.9 (emphasis added; internal quotation marks and citation omitted).[1]

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[1] Respondent claims that the Eighth Circuit "had to adopt the bright line rule by default" because it lacked evidence of the jurors' conduct. Br. in Opp. 15. That makes no sense. The Eighth Circuit could just as easily have adopted a contrary rule and reversed on the ground that the district court failed to inquire whether the jurors were subjected to prejudicial influences.

Respondent next argues that *Wagner* is distinguishable because the judge declared a mistrial before discharging the jury. See Br. in Opp. 16. As the Eighth Circuit observed, it is true that, at the time of its decision, none of the cases on the other side of the circuit conflict involved a situation in which jurors had been recalled to rescind the previous disposition of the case and announce a substantively different verdict. See *Wagner*, 758 F.3d at 1036 n.10. In that sense, it was uncertain whether those courts would extend their rule to such a context.

But now the Ninth Circuit has done just that. The judge recalled the discharged jurors to rescind the prior verdict, conduct new deliberations, and reach a substantively different verdict. While the prior disposition in this case was an affirmative verdict for one party, rather than a mistrial, that is a meaningless distinction. Both situations equally implicate the Eighth Circuit's concerns about the "potential for confusion, unintended compulsion," and giving a "vacillating juror an opportunity to reconsider"—"especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions." *Wagner*, 758 F.3d at 1036. For that reason, it is unsurprising that the Ninth Circuit recognized that its decision was in conflict with *Wagner*.[2]

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[2] In a related vein, respondent asserts that, in *Wagner*, the Eighth Circuit "allow[ed] a jury to be recalled, in limited circumstances, once discharged." Br. in Opp. 15. That is highly misleading. At most, the Eighth Circuit contemplated that a judge could recall jurors after declaring the jury discharged *if the jurors remained in the courtroom*, in the judge's presence, during the entire period of "discharge." See *Wagner*, 758 F.3d at 1036. That is obviously not what happened here. And contrary to respondent's assertion (Br. in

c. As for the other cases in the circuit conflict, respondent seemingly agrees that, like the Ninth Circuit, the Second, Third, and Seventh Circuits have adopted a rule that would allow a judge to recall jurors after they have been discharged and have left the judge's presence, as long as the judge determines that the jurors were not actually prejudiced in the intervening period. See Br. in Opp. 9-13 (discussing *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010); *United States* v. *Figueroa*, 683 F.3d 69 (3d Cir. 2012); and *United States* v. *Marinari*, 32 F.3d 1209 (7th Cir. 1994)). In each of those cases, the court of appeals held that the recall of discharged jurors was permissible. See Pet. 12-14.

Respondent merely quibbles with where *Summers* v. *United States*, 11 F.2d 582 (4th Cir.), cert. denied, 271 U.S. 681 (1926), falls on the circuit conflict. In particular, respondent notes that decisions adopting a more expansive rule have quoted or cited *Summers*, see Br. in Opp. 9-13, and he claims that *Summers* does not conflict with the decision below because the Fourth Circuit did not "identify the boundaries" of its rule, *id.* at 9. For those reasons, he argues, *Summers* is consistent with the Ninth Circuit's decision in this case. See *ibid.*

As a preliminary matter, regardless of how *Summers* is characterized, there is a clear division of authority on the question presented between the Eighth Circuit, on the one hand, and the Second, Third, Seventh, and Ninth Circuits, on the other. Especially given the importance of the question presented, that conflict among the courts

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Opp. 15), such a narrow exception would not render the Eighth Circuit's rule the "same" as the more expansive rule adopted by the Second, Third, Seventh, and Ninth Circuits. See Pet. 11-14.

of appeals is more than sufficient, even without *Summers*, to warrant this Court's review.

What is more, respondent's efforts to recharacterize *Summers* are unpersuasive. Numerous courts, including the Ninth Circuit here, have recognized that those courts that have adopted the more expansive rule have "extended" *Summers* to situations beyond that approved by the Fourth Circuit. See Pet. App. 7a. In particular, in *Wagner*, the Eighth Circuit correctly observed that *Summers*, as well as the cases on which it relied, involved a situation in which the trial judge "nominally discharged the jury but corrected errors before the jury dispersed from the courtroom and the direct view of the trial judge." *Wagner*, 758 F.3d at 1035 n.9. And in *Summers* itself, the Fourth Circuit explained that a jury is "irrevocably discharged" when the jurors are "allowed to disperse and mingle with the bystanders, with time and opportunity for discussion of the case, *whether such discussions be had or not*." 11 F.2d at 586 (emphasis added). As a result, it is "inconsistent" with *Summers* to read it to permit recall where jurors have dispersed outside the courtroom beyond the view of the judge. See *Wagner*, 758 F.3d at 1035 n.9.

For similar reasons, respondent errs when he claims that *Summers* does not conflict with the decision below because the Fourth Circuit did not "identify the boundaries" of its rule. Br. in Opp. 9. As petitioner has noted (Pet. 11), the Fourth Circuit held that a jury has been "irrevocably discharged" when jurors are "allowed to disperse and mingle with bystanders, with time and opportunity for discussion of the case, *whether such discussions be had or not*." 11 F.2d at 586 (emphasis added). This case unquestionably would have come out differently under the Fourth Circuit's rule, because the jurors had left the courtroom (and mingled with non-jurors

outside the judge's control) before the judge recalled them.

In any event, the bottom line here should not be obscured: as the courts of appeals themselves have recognized, there is a clear circuit conflict on the legal standard governing the recall of discharged jurors. That conflict, on an important and recurring question, warrants resolution by this Court.

2. Respondent's remaining arguments require little by way of reply.

a. Respondent halfheartedly argues that the Court should deny the petition because it denied a petition for certiorari in *Wagner* and "there is no additional reason to address" the question presented in this case. Br. in Opp. 7. But respondent completely ignores the reasons petitioner has already offered as to why this case is a vastly superior vehicle for further review. See Pet. 19-20. To begin with, the Ninth Circuit's decision here deepens the circuit conflict and is itself squarely in conflict with the Eighth Circuit's decision in *Wagner*. Thus, to the extent that there was any doubt about the existence of a conflict at the time of *Wagner*, the Ninth Circuit's decision dispels it. In addition, resolution of the question presented is outcome-dispositive here, but likely would not have been in *Wagner*. Not only did the Eighth Circuit identify errors in the jury instructions that independently would have required a new trial; the absence of evidence about the jurors' conduct after discharge meant that, even under a more expansive rule, a new trial may still have been required. See *Wagner*, 758 F.3d at 1036-1037. In addition, the petitioner in *Wagner* disputed the Eighth Circuit's characterization of the facts, further complicating the case. See Pet. 19-20.

Here, by contrast, respondent does not dispute that this case is a suitable vehicle for considering the question

presented. Respondent concedes that the initial verdict was invalid, see Br. in Opp. 3; that, after the jury was discharged, the jurors left the courtroom, see *id.* at 4; and that, upon recalling the jurors, the judge inquired into the outside influences they encountered prior to recall, see *ibid.* This case thus cleanly and squarely presents the Court with the opportunity to decide whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

b. Finally, respondent dismisses as irrelevant the decisions from state courts of last resort addressing the question presented. See Br. in Opp. 17-18. Respondent contends that at least some of the cited decisions from state courts of last resort turn entirely on state law, not federal law, on the ground that the fundamental constitutional guarantee of a fair trial is "not at issue" in civil cases. *Id.* at 18. But respondent's premise is evidently incorrect: this Court has repeatedly recognized that "a fair trial in a fair tribunal is a basic requirement of due process" protected by the Fourteenth Amendment in civil as well as criminal cases. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); see *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). If anything, the constitutional implications of recalling discharged jurors after they have left the judge's presence merely heighten the importance of the question presented. See Pet. 16-17.

But regardless of whether the question presented here is ultimately a matter of state law when it is considered by state courts (an issue that this case obviously does not present), the decisions from at least 23 state courts of last resort—in addition to those from six federal courts of appeals—demonstrate the frequency with which the question arises and the ripeness of the ques-

tion for this Court's resolution. See Pet. 14-15. The federal and state courts to address the question have fully developed all of the relevant arguments on both sides of the question, rendering further percolation of no benefit. Indeed, when faced with the question themselves, federal courts routinely discuss the reasoning of state-court decisions. See, *e.g.*, Pet. App. 9a, 10a; *Wagner*, 758 F.3d at 1034-1035. The intractable conflict among the state courts of last resort only confirms that the similarly intractable conflict among the federal courts of appeals will persist until this Court intervenes to resolve it. For that reason, and in light of the indisputable importance of the question presented, this case plainly warrants the Court's review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2015

SUPREME COURT, U.S.
FILED
FEB 29 2016
OFFICE OF THE CLERK

No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI FILED: OCTOBER 9, 2015**
**CERTIORARI GRANTED: JANUARY 19, 2016**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 13-35377

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ROCKY DIETZ, Plaintiff-Appellant

v.

HILLARY BOULDIN, Defendant-Appellee

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**DOCKET ENTRIES**

| DATE | DKT NO. | PROCEEDINGS |
|---|---|---|
| 05/03/2013 | 1 | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 05/10/2013. Transcript ordered by 06/03/2013. Transcript due 07/01/2013 Appellant Rocky Dietz opening brief due 08/12/13. Appellee Hillary Bouldin answering brief due 09/11/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8614630] (GR) |

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|---|---|---|
| | | [Entered: 05/03/2013 08:23 AM] |
| | | * * * * * |
| 11/04/2013 | 9 | Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Rocky Dietz. Date of service: 11/04/2013. [8848652] (Angel, Geoffrey) [Entered: 11/04/2013 12:42 PM] |
| | | * * * * * |
| 12/31/2013 | 17 | Submitted (ECF) Answering Brief and excerpts of record for review. Submitted by Appellee Hillary Bouldin. Date of service: 12/31/2013. [8920815] (Beaudette, Jesse) [Entered: 12/31/2013 11:00 AM] |
| | | * * * * * |
| 02/13/2014 | 23 | Submitted (ECF) Reply Brief for review. Submitted by Appellant Rocky Dietz. Date of service: 02/13/2014. [8978125] (Angel, Geoffrey) [Entered: 02/13/2014 01:52 PM] |
| | | * * * * * |
| 01/26/2015 | 29 | Filed clerk order (Deputy Clerk: SM): The parties are invited to submit supple- |

| | | |
|---|---|---|
| | | mental briefs addressing the Eighth Circuit's recent decision in Wagner v. Jones, 758 F.3d 1030 (8th Cir. 2014). These supplemental briefs may be in the form of letters to the clerk of court, shall be no longer than 5 pages or 1,400 words and shall be submitted no later than Monday, February 2, 2015. The parties shall file the supplemental briefs electronically without submission of paper copies. [9396221] (SM) [Entered: 01/26/2015 03:47 PM] |
| | | * * * * * |
| 02/02/2015 | 32 | Submitted (ECF) Letter Brief for review. Submitted by Appellant Rocky Dietz. Date of service: 02/02/2015. [9406070] [13-35377]— [COURT UPDATE: Attached corrected brief. 02/06/2015 by RY] (Angel, Geoffrey) [Entered: 02/02/2015 06:32 PM] |
| 02/02/2015 | 33 | Submitted (ECF) Letter Brief for review. Submitted by Appellee Hillary Bouldin. Date of service: 02/02/2015. [9406165] [13-35377]— [COURT UPDATE: Attached corrected brief and backdated |

| | | |
|---|---|---|
| | | entry to reflect correct filing date. 02/03/2015 by TL] (Beaudette, Jesse) [Entered: 02/03/2015 07:49 AM] |
| | | * * * * * |
| 02/04/2015 | 35 | ARGUED AND SUBMITTED TO RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA. [9408546] (KM) [Entered: 02/04/2015 10:47 AM] |
| | | * * * * * |
| 07/24/2015 | 37 | [9621025] FILED OPINION (RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA) AFFIRMED. Judge: RCF Authoring Judge: CTB Concurring. Filed and entered judgment. [9621025]—[Edited 07/24/2015 by RP] (RMM) [Entered: 07/24/2015 07:20 AM] |
| 07/24/2015 | 38 | Filed memorandum (RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA) AFFIRMED. [9621032] (RMM) [Entered: 07/24/2015 07:26 AM] |
| 08/18/2015 | 39 | MANDATE ISSUED. (RCF, CTB and MHM) [9650529]- |

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|---|---|---|
| | | (RL) [Entered: 08/18/2015 09:58 AM] |
| 10/15/2015 | 40 | Received notice from the Supreme Court: petition for certiorari filed on 10/09/2015. Supreme Court Number 15-458 [9718879] (RL) [Entered: 10/15/15 8:21 AM] |
| 01/20/2016 | 41 | Received Supreme Court order dated 01/19/2016. The petition for a writ of certiorari is granted. Supreme Court No. 15-458 [9834327] (RL) [Entered: 01/20/2016 04:38 PM] |

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
(BUTTE)

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No. 2:11-cv-00036-RWA

---

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

---

**DOCKET ENTRIES**

| DATE | DKT NO. | PROCEEDINGS |
|---|---|---|
| 07/13/2011 | 1 | NOTICE OF REMOVAL by Hillary Bouldin from Eighteenth Judicial District, Gallatin County, case number DV-102A., filed by Hillary Bouldin (Attachments: #1 Complaint, #2 Answer, #3 Dietz Answers and Responsed to Bouldin's First Discovery, #4 Civil Cover Sheet) (CRM,) (Entered: 07/13/2011) |
| | | * * * * * |
| 07/15/2011 | 3 | COMPLAINT against Hillary Bouldin, filed by Rocky Dietz. (State Court Filing) (CRM,) (En- |

tered: 07/15/2011)

| | | |
|---|---|---|
| 07/15/2011 | 4 | ANSWER to 3 Complaint with Jury Demand by Hillary Bouldin. (State Court Filing) (CRM,) (Entered: 07/15/2011) |
| 07/20/2011 | 5 | ORDER REFERRING CASE to Magistrate Judge Richard W. Anderson. Signed by Chief Judge Richard F. Cebull on 7/20/2011. (EMA) (Entered: 07/20/2011) |

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|---|---|---|
| 08/09/2011 | 8 | CONSENTS TO USMJ. (CRM,) (Entered: 08/09/2011) |

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|---|---|---|
| 04/16/2013 | 82 | Minute Entry for proceedings held before Richard W. Anderson: July Trial held on 4/18/2013. Hearing commenced at 9:00 a.m. with cnsl Geoffrey Angel for Pla and Jesse Beaudette for Dft. 27 prospective jurors present. Clerk administers the first oath to prospective jurors. Clerk calls 13 names in the box. Introductions are made by the Court. Court addresses jurors regarding the case and conducts voir dire. Voir dire is conducted by ea cnsl. Court is recessed and challenges made in chambers and on the record. All present in courtroom and Clerk reads the names of the 7 se- |

lected jurors. Clerk administers the 2nd oath to selected jury. Opening stmts by ea cnsl. Exh 101, 102, 103, 106, 108, 110 and 112 admitted w/no obj. Pla has depo of witness Dr. Vallim read. Exh 107 is admitted w/obj to letter only. Noon recess at 11:45. All present in court at 1:00. Pla witness Dietz S/E. Dft Exh 507 (photos) admitted. Dft Exh 506 admitted w/obj. Dft. Exh 503 admitted w/obj. Dft Exh 505 admitted w/obj subject to redction. Dft Exh 509 admitted w/no obj subject to redaction. Court concluded at 4:40 p.m to begin on 4/17/13 at 9:00 a.m. Jury excused and Court in recess. (Court Reporter Ann Wayrynen.) (ELL,) Modified on 4/18/2013 (ELL,). (Entered 04/18/2013)

| | | |
|---|---|---|
| 04/17/2013 | 84 | Minute Entry for proceedings held before Richard W. Anderson: Day Two of Jury Trial held on 4/17/2013. Hearing commenced at 9:00 a.m. with all present in courtroom w/jury. Cont. of exam of witness Dietz. Pla witness Bouldin S/E. Pla witness Dr. Capps S/E. Pla rests at 9:50 am. Dft witness Dr. Capps S/E. Dft. Exh 501 admitted w/redactions w/obj. Dft Exh 502 admitted subject to redactions w/obj. Dft Exh 504 admitted w/obj. |

| | | |
|---|---|---|
| | | On record w/o jury. Pla moved for mistrial and court denies. Dft rests at 1:30 pm. Cnsl to chambers to settle jury instructions. In court w/all present and Court gives jury instructions. Closing arguments by ea cnsl. Clerk adm oath to Bailiffs. Jury deliberates. In court and on the record w/o jury and pla motions for mistrial and court denies. Pla Exh 104 and 114 are admitted by stipulation. In court and on the record w/jury question. All present w/jury verdict. Court publishes. Court sends jury back into deliberations as verdict is rejected and jury is instructed. Court recesses and jury will resume deliberations at 9:00 am. (Court Reporter Kathy Hilton.) (ELL,) (Entered: 04/18/2013) |
| 04/18/2013 | 83 | ORDER for Meals and Lodging Signed by Richard W. Anderson on 4/18/2013. (CRM,) (Entered: 04/18/2013) |
| 04/18/2013 | 85 | Minute Entry for proceedings held before Richard W. Anderson: DA[Y] THREE Jury Trial held on 4/18/2013. Hearing commenced at 9:40 and concluded at 9:45. In courtroom w/all present and jury on the record. Clerk publishes verdict and jurors are excused. Court re- |

| | | |
|---|---|---|
| | | cesses. (Court Reporter Ann Wayrynen.) (ELL,) (Entered: 04/18/2013) |
| | | * * * * * |
| 04/18/2013 | 88 | JURY VERDICT 2. (Attachements: #1 Jury Verdict) (ELL,) (Entered: 04/18/2013) |
| | | * * * * * |
| 04/18/2013 | 93 | CLERK'S JUDGMENT in favor of Rocky Dietz against Hillary Bouldin (ELL,) (Entered: 04/18/2013) |
| 05/02/2013 | 94 | NOTICE OF APPEAL by Rocky Dietz. Filing fee $455, receipt number 0977-1231076. (Attachments: #1 Exhibit Representation Statement) (Angel, Geoffrey) (Entered: 05/02/2013) |
| | | * * * * * |

GALLATIN COUNTY DISTRICT COURT

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No. DV-16-2011-0000102-NE

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ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

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**DOCKET ENTRIES**

| DOC. SEQ. | ENTERED | FILED | TEXT | JUDGE |
|---|---|---|---|---|
| 1.000 | 01/27/2011 | 01/27/2011 | Complaint | Brown, Holly B. |
| | | * * * * * | | |
| 4.000 | 04/18/2011 | 04/18/2011 | Defendant's Answer and Jury Demand | Brown, Holly B. |
| | | * * * * * | | |
| 19.000 | 07/14/2011 | 07/14/2011 | Defendant Hillary Bouldin's Notice of Removal | Brown, Holly B. |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

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No. CV-11-36-BU-RWA

---

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

---

April 16, 2013

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**PARTIAL TRANSCRIPT OF PROCEEDINGS**
**VOLUME I**

Before: Richard W. Anderson, US District Court Judge.

APPEARANCES

FOR THE PLAINTIFF

GEOFFREY C. ANGEL
ANGEL LAW FIRM
803 West Babcock
Bozeman, Montana 59715

FOR THE DEFENDANT JESSE BEAUDETTE
BOHYER, ERICKSON,
BEAUDETTE & TRAN-
EL, PC
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Suite 201
Missoula, Montana 29807

* * * * *

[37] Q. Let me ask this: What were you doing that morning with your mother's vehicle?

A. I had just come from washing it over at Duds & Suds and was heading up to the gas station to fill it up before I left town. I was going to leave town that next morning. I was just trying to be the good son, one might say, and created a problem.

Q. So this is Sunday. You were going to leave Monday morning?

A. Correct. I was going to head back to the Bismarck/Mandan area. Monday morning was my plan.

* * * * *

[53] Q. But you are saying that all of the scheduled appointments you completed?

A. Correct.

Q. You just quit scheduling them?

A. Correct. I was going to get physical therapy when I came back from Missoula there, but I went ahead — well, I had an appointment set up, but I went ahead

and I canceled everything after I was sent out to Missoula to see Dr. Capps.

[54] Q. Let's talk about that. You and I went to Missoula. Why did you go there?

A. I was under court order.

Q. Okay. And you met a woman, Dr. Catherine Capps?

A. Correct.

Q. And tell us. What did she do?

A. What did she do?

Q. Yes.

A. She had a very, very, very, thorough exam that I was very, very, very pleased with. I looked at her as more of a friend.

Q. Okay.

A. I was very impressed with what she all done there. I was very, very — I had doctors that never put — over a period of time they put my neck and stuff together that weren't as concerned as this lady was.

Q. You understand that she wasn't there to treat you, but she was there to look at you for the defense?

A. Exactly. There was no treatment, but there was an exam that was just — I don't ever recall having an exam, whether it be Dr. Addy, Dr. Schmelka, any of my

doctors in the past, Dr. Woods. It was quite the exam, examination that she put me through.

Q. Okay. And she recommended some testing? You are aware of that?

[55] A. Correct. Quite a little testing, actually.

Q. Do you remember what was involved in it?

A. Not exactly. That's all over my education. Those words are way over my head, a lot of it. Everything from MRIs — I know x-rays, little things like that. But some of the stuff that she wants I have no clue.

Q. Spinal cord survey?

A. Yeah, exactly. What that all consists of, I have no idea.

Q. Did you get those tests done?

A. No, I did not.

Q. Why not?

A. I can't afford it.

Q. Did you have any additional treatment after this physical therapy I think in Mandan? Have you seen any other doctors since, I think it is, 2010, 2011?

A. Have I seen any doctors relating to the accident?

Q. Yes.

A. No. Dr. Capps was the last doctor I've seen.

Q. Do you agree that your physical therapy that you do at home, those exercises, has done wonders for your condition?

A. It helps me a lot.

Q. And where is your pain level along this spectrum say in the last month? Where are you getting to?

A. The six to eight range. This weather that has come [56] in since I've come back into the state hasn't helped my matters at all. The colder, the greater.

Q. And you want the opportunity to get these shots, the 15 shots that Dr. Vallin has recommended?

A. Correct.

Q. Do you know when you would do those shots?

A. Like I said earlier, if Dr. Vallin was here today, I would be more than pleased to get on the table for him.

THE COURT: Mr. Angel, I think we'll take a recess at this point for 15 minutes. We'll be recessed until 2:30.

You may step down, sir

THE WITNESS: Thank you.

(Whereupon, a brief recess is taken.)

THE COURT: Be seated, please.

We are back in session. Mr. Dietz is on the stand. You may go ahead.

MR. ANGEL: Thank you, Your Honor.

Q. Rocky, I'm going to move to a new subject. There was this discussion about other accidents and your low back. Is it true you were injured in an elevator accident in Las Vegas some months — maybe eight, ten months — before the car accident?

A. Yeah. That would be Halloween, by the way, of 2008.

* * * * *

[95] Q. If you look at Question No. 2, it says, describe any physical or mental limitations you have as a result of your condition. You wrote, walking, standing, sitting, driving, can't do any of this for any period of time, lots of pressure in neck and whole body hurts, correct?

A. That is correct.

Q. If you go down to Question No. 4, it says, do you have any additional illness or injury that you feel we should know about? If yes, describe the kind of illness or injury and the date that it occurred. You wrote, yes, over 1,000 stitches head to toe, fused neck, fused foot, bad back, hips, knees, ankles. Correct?

A. That is correct.

Q. If you look at page 11.

A. I'm there.

Q. Question No. 10, it asks about how your injury affects your ability to care for your personal needs. You

wrote, hard to get up, stiff, pain unbearable at times. Correct?

A. That is correct.

THE COURT: Counsel, at this time I think we'll take our second afternoon recess. Say ten minutes. We'll be in recess. You may step down.

[96] (Whereupon, a brief recess is taken.)

THE COURT: You may be seated. You may continue.

MR. BEAUDETTE: Thank you.

Q. Are you ready, Mr. Dietz?

A. Yes.

Q. If you look at Exhibit 505, page 15.

A. I'm there.

Q. That is your handwriting, correct?

A. That is correct.

Q. Starting from the top there you discuss how your hygiene ways had changed as of 2001, we are talking about, correct?

A. That is correct.

Q. You note that at that time that all in all your hygiene and appearance ways have changed a lot, where it

doesn't bother you to put a hat on, sweats, or robe for the day, same clothes and shower every other day. Correct?

A. That is correct.

* * * * *

[123] Q. Okay. Starting on the second line towards the right, overall he's doing much better, noting complete amelioration of his leg pain and significant reduction in his low back pain, correct?

A. That is correct.

Q. And on the very bottom of that page he notes that he encouraged you to remain compliant with the home exercises previously taught to you in physical therapy. Otherwise, I have no additional recommendations. Correct?

[124] A. That is correct.

Q. That's the last time you ever saw Dr. Vallin?

A. Other than when you and I saw him together.

Q. Correct. I mean as a treating doctor.

A. As a treating doctor, yes.

THE COURT: Counsel, I think this is a good breakpoint for the day. It's been a long day for the jury. They have been here since 8:00. I happen to know that. So we'll take our evening recess right now.

Jurors, one thing I want to do is cure a serious omission I made this morning. When I was making the intro-

ductions I neglected to introduce a very important person in the court, namely, my law clerk who sits over here behind the screen. The fact that she was behind the screen caused me to forget to introduce her. Her name is Kelly Harrington, and she's been a law clerk in this court for many years and is an invaluable resource officer.

Now, you'll be excused until 9:00 tomorrow morning. Please, as I said at the noon break, withhold attempting to decide the case even tentatively until it's submitted to you finally. Don't talk to anybody about the case or form any opinions. And let me know if anybody persists in trying to talk to you. Tell them that you are a juror.

I hope you have a pleasant evening. And tomorrow we are supposed to have something to eat waiting for you when you get [125] here, so you might want to be a little early.

You may step down.

THE WITNESS: Thank you.

THE COURT: Court is in recess.

(Whereupon, court is recessed for the day.)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

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No. CV-11-00036-BU-RWA

---

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

---

April 17, 2013

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**PARTIAL TRANSCRIPT OF PROCEEDINGS**
**VOLUME II**

Before: Richard W Anderson, US District Court Judge.

APPEARANCES

FOR THE PLAINTIFF

GEOFFREY C. ANGEL
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FOR THE DEFENDANT JESSE BEAUDETTE
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[130] MORNING SESSION, WEDNESDAY, APRIL 17, 2013

THE COURT: Morning, jurors.

JURY PANEL: Good morning.

THE COURT: The record will show that all the jury have returned this morning, all seven of them. They're in the box and ready to go; is that right?

JURY PANEL: (Heads nod)

THE COURT: Were you well treated this morning back there in the jury room?

JURY PANEL VOICES: Very well.

THE COURT: Thumbs up. Very good. Okay, Mr. Dietz is on the stand for the continuation of Cross-Examination.

MR. BEAUDETTE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BEAUDETTE:

Q. Good morning, Mr. Dietz.

A. Good morning.

Q. I want to pick up where we left off yesterday. And the first thing I want to talk about this morning is future injections; okay? I want to ask you to look at Page 109 of your deposition, which is up on top of the counter there in front of you.

A. I'm there.

Q. I want to look — We'll actually start on Page 108 at Line 20; okay?

[131] A. What line was that?

Q. Line 20 on Page 108. Okay, and I asked you the question, "So let me — You get the shots from Dr. Vallin, and then you are improved about 60 percent for three months." You said, "No." And then my question went on, "And then your pain starts to come back? Or is it after three months the pain is back?" You said, "After three, roughly three months, approximately three months. It's a temporary fix. I'll never go there again." Is that your testimony?

A. Correct.

* * * * *

[167] Q. And are you currently licensed to practice medicine?

A. Yes, I am in the state of Montana.

Q. Any other states?

A. Well, California I'm on inactive status because I plan never to go back there.

Q. Okay. And Dr. Capps, at any time during your testimony today, if you need to refer to your report or your file in front of you, please do so. Can you identify for the jury the medical records that you had reviewed. And I don't mean just identify each one, but just the providers, who they were from.

THE COURT: All right, we're now going to focus on the examination; right?

MR. BEAUDETTE: Yes.

THE COURT: I think this would be a good point to take a morning recess. We'll do so. Jurors, we will be in recess until 10:15. You can step down.

THE WITNESS: Okay, thanks. Can I just leave this here?

THE COURT: Yes.

[168] (Whereupon, a brief recess was held.)

THE COURT: Back in session. Dr. Capps is on the stand. You may continue, counsel.

MR. BEAUDETTE: Thank you, Your Honor.

Q. (BY MR. BEAUDETTE, continuing) Dr. Capps, we left off, I'd asked you if you could identify the providers that — whose medical records you had reviewed as part of your functions in this case in developing your opinions.

A. Okay, the first medical records I received included those from Bismark Surgical Associates, Dakota Physical Therapy, Pain Treatment Center Anesthesiologists, Regional Medical Center, Bozeman Deaconess Hospital, Bridger Orthopedic and Sports Medicine, Rocky Mountain Surgical Center, Desert Inn Medical Center in Las Vegas, Lake Mead Radiologists, which is also Nevada, Nevada Imaging Centers, University Medical Center of Southern Nevada, Billings Clinic, St. Vincent Hospital.

Q. And did those records include both pre-motor vehicle accident and post-motor vehicle accident records?

A. Yes, they did.

Q. And did you have a chance to review all those before you examined Mr. Dietz?

A. Yes, I did.

* * * * *

[197] Q. Now, as part of your exam of Mr. Dietz, he filled out a pain diagram; correct?

A. Yes, he did.

Q. And where did he identify his pain to be?

A. In his left buttock and the back of his left thigh.

Q. Did he indicate any other pains that he was alleging are related to this accident?

A. He implied his midline back pain was back to baseline.

Q. Okay. When you say his midline back pain, what are you [198] talking about?

A. The pain in his low back, directly over his back.

Q. Okay. And when you say back to baseline, what do you mean?

A. Back to how he was originally.

Q. Prior to the accident?

A. Prior to the accident.

Q. And did you perform a physical exam of . . . of Mr. Dietz?

A. Yes, I did.

Q. And with regard to the lumbar region, the left hip, the left leg, what did your exam reveal?

THE COURT: Counsel, I think before we get into that, we're going to take another brief recess at this point.

MR. BEAUDETTE: Okay.

THE COURT: Let's say until 11:15, 11:20, somewhere right in there. Jurors, for your own planning, we're going to have to take it, because of some other cases, an extended lunch break. We will be in recess for lunch from approximately a quarter to 12 until 1:30. You'll have that much time to be on your own. I just wanted to let you know that. But for now, we'll be in recess for five or ten minutes, whatever you need. You may step down.

(Whereupon, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: The record will show we are in the courtroom with counsel for the parties but outside the presence of the jury and [199] during a recess. Plaintiff has requested leave to file or to make an oral motion for mistrial based upon certain events that occurred yesterday. And I've granted that request. Mr. Angel, you may proceed.

MR. ANGEL: Thank you, Your Honor. The Plaintiff does move for a mistrial based on the violation of the Court's order *in limine* regarding the presentation of evidence of the use of Methadone. We do have one juror that's a pharmacist. It is the juror that can't hear very well; but with the seven jurors, there's undoubtedly going to be some or all of them that heard that. And like the mentioning of insurance, there's really no way to remove that and have a fair deliberation. So, on that basis, we move for a mistrial.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, it was an inadvertent mention of Methadone. And the phrase was in his own handwriting. It analyzed Methadone, and there was nothing indicating that he was taking it for any improper reason, anything other than for treatment. I didn't imply that he was abusing it, anything along those lines.

THE COURT: Yeah. Well, it was unfortunate and it was in violation of the Court's order, but I accept coun-

sel's word that it was inadvertent. The jury was instructed to disregard both the question and the answer, and counsel for defense also withdrew the question, all on the record and in the presence of the jury. The error was — I'm going to treat it as harmless. I don't think it [200] will affect the outcome of the trial one way or the other. It was not prejudicial and therefore the motion for mistrial is denied.

MR. BEAUDETTE: Thank you, Your Honor.

(Whereupon, a brief recess was held. Thereafter, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: We're back in session. Counsel, you may proceed.

MR. BEAUDETTE: Thank you, Your Honor.

Q. (BY MR. BEAUDETTE, continuing) Dr. Capps, we were just beginning to discuss your examination of Mr. Dietz with regard to low back, left buttock and hip, and left leg pain. Can you please explain to the jury what you found on your examination of Mr. Dietz with regard to those conditions?

A. Okay. As I mentioned, I usually start with all the standing up, walking stuff. And he had a slight left limp. He was able to toe-and-heel walk, which also tests muscle power. But it caused increased pressure over the back side of his left hip. And then there's some balance testing, which was okay. And he did not have any hip weakness. The right buttock, when you look from above, it looked a little smaller. But from the back, it looked the

same. Because of the neck issues, I examined the neck. I don't know if you want me to say the pertinent findings there.

Q. No.

* * * * *

[212] MR. ANGEL: I have no additional questions of this witness.

THE COURT: All right. Anything further?

[213] MR. BEAUDETTE: No, Your Honor.

THE COURT: Well, it looks like you're going to be limited to half a day.

THE WITNESS: Oh, gosh.

THE COURT: You may step down, and may she be excused?

MR. BEAUDETTE: Yes, Your Honor.

THE COURT: All right. Jurors, as I told you a bit earlier, we'll be in recess now for lunch until 1:30. Please, as usual, refrain from trying to reach any decisions about this case at this point. And by all means, don't talk to each other or anyone else about it. With that, you're excused for lunch. We are in recess.

(Whereupon, a recess was held for lunch.)

THE COURT: Afternoon, jurors. All made it back, in the box ready to go. We'll have the afternoon session. Mr. Beaudette, you may proceed.

MR. BEAUDETTE: Well, Your Honor, Dr. Capps was our last witness. The Defense will rest.

THE COURT: Any rebuttal?

MR. ANGEL: No rebuttal, Your Honor.

THE COURT: Well, you know what that means, the testimony is over. I have to meet with the attorneys, and we'll do this off the — or outside the courtroom, outside your presence. But I have to meet with the attorneys for the purpose of preparing the Court's instructions to the jury. And it's the instructions that will give [214] you the law that you're to apply in making your deliberations. After we have settled those instructions, we'll come back into court — you'll be in recess in the meantime — and I will read them to you. We'll be giving you each your own personal copy of the instructions as well to take into your deliberations.

The counsel will then be able to argue the case to you yet this afternoon, make their final arguments. And this case will be submitted to you for your deliberations sometime around mid-afternoon I'm guessing. Maybe a little later than that. If you cannot reach a verdict by the hour of 5:00, I will excuse you for the evening and you can return to your deliberations tomorrow morning. If you have reached a verdict by or before 5:00 this afternoon, the case will be over and you are permanently excused. That's the program for here on out. So, I'll see counsel in chambers along with the court reporter. And the jury, in the meantime, is in recess until further notice.

(Whereupon, the following proceedings were held in chambers with all counsel present outside the presence and hearing of the jury:)

THE COURT: Record will show that we are in chambers with counsel, outside the jury's presence, for the purpose of settling instructions. I have given to each counsel a set of Court's proposed instructions numbered 1 through 20. This will be counsel's opportunity to make their record on those proposed instructions along with any of their offered instructions which the Court has chosen to delete. Rather than going through these instructions one by one and [215] making a separate record as we go to each one, I'm simply going to ask the counsel what their objections are to the charge, if any, and to then at that point pick out those instructions which are objectionable in counsel's view and state the objections. We'll start with Plaintiff's counsel, and then Defense counsel will have the same opportunity. As to the whole set, not one by one, go ahead, Mr. Angel.

* * * * *

[217] THE COURT: What are we going to do about these exhibits that have yet to be put into final form? Do we need to do that?

MR. ANGEL: They're both redacted. I haven't reviewed his redactions. So, Plaintiff's are ready. I have to — I've been provided with a binder, but I haven't had a chance to look at it.

THE COURT: Okay. How about if we go ahead and argue the case? I think you can argue the case without that — those being in their final form; can't you?

MR. BEAUDETTE: Yes, Your Honor, I can.

MR. ANGEL: Yes, Your Honor.

[218] THE COURT: And at that point we will send the jury in for their deliberations. And while they're deliberating, we — We won't send them with the exhibits quite then. It might take a half an hour or so; but shortly thereafter, we'll have the clerk go in there and say, "Here are the exhibits. "

MR. ANGEL: Okay.

THE COURT: Would that be all right?

MR. BEAUDETTE: Yes, Your Honor.

THE COURT: Do you think you can argue the case without them?

MR. BEAUDETTE: Yes.

MR. ANGEL: Yes, Your Honor.

THE COURT: Okay. Well, what is it? It's a quarter — Let's take 15 minutes just to give you a moment to collect your thoughts a little more, and we'll argue at 2:00. I will read the instructions at 2:00.

MR. BEAUDETTE: Okay.

THE COURT: And then you'll argue immediately thereafter.

MR. ANGEL: Understood. I do have one question along that line. And this is probably a dumb question. I have done trials before. Do I get a rebuttal closing?

THE COURT: Yes, you do.

MR. ANGEL: Okay.

THE COURT: Do I need to place a time limit on you guys?

MR. BEAUDETTE: Mine is going to be pretty short, Your [219] Honor.

MR. ANGEL: I'll be ten minutes and five minutes or 15 minutes and five minutes.

THE COURT: Well, you certainly can take longer than that. But no, I won't place any time limits on you. But you get a rebuttal, but you know what the rules are. Has to be rebuttal.

MR. ANGEL: Yes.

THE COURT: Okay. That's it.

MR. ANGEL: All right.

MR. BEAUDETTE: All right, thank you.

THE COURT: See you in open court.

(Whereupon, a brief recess was held. Thereafter, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: The record will show counsel and the jury and parties are all present in open court. Ladies and gentlemen, this is the time, as I explained, for the Court to give you your instructions as to the law that you're to

apply in reaching your verdict. For some reason that I have never understood, I'm required to read these to you even though I know that you're perfectly capable of reading and understanding them yourselves. But the law does say that a judge has to read the instructions to the jury. And so, I'll do that; but I'll read through these rather rapidly. Don't worry if you're not quite following me, because you will be each given your own personal [220] copy of the instructions.

* * * * *

[226] Those, ladies and gentlemen, 20 of them, that completes the [227] instructions of the Court. Very shortly, within the next 20 or 30 minutes, we will be sending into the jury room for you the exhibits, which have been introduced into evidence in this case. You will not take them immediately, but they'll come to you very quickly. You will take your personal copies of the Court's instructions with you. And you may begin your deliberations following the arguments of counsel, immediately following the arguments of counsel. Mr. Angel.

* * * * *

[245] THE COURT: All right, jurors, you know, for a day and a half now I've been telling you not to decide this case, to just stay where you are, neutral. Now is the time to begin to decide it. You will go into the jury room for your deliberations. Nobody can be in there with you. Nobody can tell you what to do. Nobody can listen to what you say. Nobody can watch you. You are totally, totally on your own in absolute secrecy and in silence. There are no cameras in there, no microphones in there. Speak freely in your conversations with each other. It is totally up to you now. And nobody, even myself nor any-

one else, can pretend to tell you what your verdict ought to be.

You will be given a verdict form. And it's a very short form with one blank. And the blank is how much? That will be your function. That will be your purpose. And that will be your verdict. How much? How many dollars? What's fair and what's right from the evidence you've heard? And that's it. When you reach that number unanimously, you have reached your verdict. If you are unable to reach a verdict by, say, a quarter to five or thereabouts, I will be excusing you until tomorrow morning to continue your deliberations. I want you to have plenty of time and not feel hurried. With that, the jury may retire to its deliberations.

[246] Oh, and swear the bailiff. She has to go ahead and do that.

THE CLERK: Okay, bailiffs, come forward.

THE COURT: How many bailiffs do we have?

THE CLERK: We have four.

THE COURT: Four bailiffs. That should be enough.

THE CLERK: Yep.

(Whereupon, the bailiffs were sworn to take charge of the jury. Thereafter, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: Mr. Angel, you have a motion. We're outside the presence of the jury now. They've retired to their chambers. We're in open court.

* * * * *

[247] (Whereupon, a recess was held pending return of the jury.

Thereafter, the following proceedings were held with all counsel [248] present outside the presence and hearing of the jury:)

THE COURT: Record will show we are in the courtroom outside the jury's presence to consider a note the jury has sent in to us at 3:35 p.m. And it's signed by one of the jurors. I cannot make out from the signature which one it is. In any event the question reads as follows: "Has the $10,136 medical expenses been paid; and if so, by whom?" Question mark. I propose to answer that by saying it is not permissible for the Court to provide this information, and it is not germane really to the jury's job of reaching a verdict. Any objection to that?

MR. ANGEL: No, Plaintiff would agree.

MR. BEAUDETTE: No, Your Honor.

THE COURT: What I'm wondering — Let's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the argument and the instructions, that their verdict may not be less than that amount?

MR. BEAUDETTE: I would think so, Your Honor.

THE COURT: I would too.

MR. BEAUDETTE: And I thought I made it crystal clear that they have to award that amount and that they should award that amount.

THE COURT: I agree. I regret, for the moment, that I [249] didn't include an instruction as a matter of law saying that that sets the floor. But then, for some people, that sets the ceiling. I would like to avoid that. I don't know where this is going to lead; but I think, for the moment at least, I'll ask the clerk, Erika, to answer the question in writing so we don't have to bring them all in here.

THE CLERK: Uh-huh.

THE COURT: And simply say at the bottom of the same note, "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." And you just let me initial that, and you can trot it back in there.

THE CLERK: Okay. I have, "The Court cannot provide this information. It is not germane to the jury's verdict."

THE COURT: In any event.

THE CLERK: In any event, okay. Okay.

THE COURT: Okay, let me initial that, and get it back in there. Counsel satisfied with the way this has been handled?

MR. BEAUDETTE: Yes, Your Honor.

MR. ANGEL: Yes, Your Honor.

THE COURT: Okay.

(Whereupon, recess continued pending return of the jury.[)]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 13-35377

---

ROCKY DIETZ, Plaintiff-Appellant

v.

HILLARY BOULDIN, Defendant-Appellee

---

**MEMORANDUM***

Before: FISHER, BEA and MURGUIA, Circuit Judges.

Rocky Dietz appeals from a judgment awarding him $15,000 in damages for injuries stemming from an auto collision.[1] We affirm.

1. Although Bouldin's counsel violated the order in limine prohibiting mention of Dietz's past methadone use, given the limited nature of the breach, and because the district court promptly issued a curative instruction, the district court did not abuse its discretion when it concluded the violation of its order was not prejudicial.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[1] We address Dietz's argument that the district court erred by re-calling the jury after dismissal in an opinion filed concurrently with this memorandum disposition.

*See United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998). Furthermore, the district court did not clearly err by concluding that Bouldin's closing summation did not violate the order in limine prohibiting argument that Dietz was motivated by secondary gain. *See Lasar v. Ford Motor Co.*, 339 F.3d 1101, 1115 (9th Cir. 2005). Therefore, the district court did not abuse its discretion in denying Dietz's motions for mistrial on either of these grounds. *See id.*

2. Because Dietz's motion for summary judgment was denied based on a disputed issue of fact that was subsequently resolved at trial, we lack jurisdiction to review the denial. *See Banuelos v. Const. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004).

**AFFIRMED.**

Supreme Court, U.S.
FILED
FEB 29 2016
OFFICE OF THE CLERK

No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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# In the Supreme Court of the United States

No. 15-458

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 794 F.3d 1093.

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 2015. The petition for a writ of certiorari was filed on October 9, 2015, and granted on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

This case presents a simple but important question: whether a federal court has the authority to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict.

After an automobile accident that left petitioner with significant injuries, petitioner brought suit against respondent in Montana state court, and the case was removed to the United States District Court for the District of Montana. Although respondent admitted responsibility for the accident and accepted liability for petitioner's medical expenses to date, the jury returned a verdict awarding petitioner $0 in damages.

The judge told the jury it was discharged, and all of the jurors left the courtroom. Some of the jurors engaged in conversation with the court clerk, and at least one left the courthouse altogether. After recessing, the judge determined that the verdict was not supported by the evidence. The judge recalled the jurors, set aside their verdict, and instructed them that they should deliberate anew and return an award for at least $10,136, the amount of petitioner's medical expenses to date. The reassembled jury returned a verdict awarding petitioner only $15,000 in damages.

The district court denied petitioner's motion for a mistrial, Pet. App. 37a, and the court of appeals affirmed, *id.* at 1a-17a. The court of appeals held that a judge may recall discharged jurors for further service in the same case even after the judge has told the jury it was discharged and the jurors have left the judge's presence and control. See *id.* at 10a-13a. Because that holding was incorrect, the judgment of the court of appeals should be reversed, and the case remanded for a new trial.

1. Petitioner is a former pipefitter residing in North Dakota. On August 9, 2009, petitioner was visiting his mother in Bozeman, Montana. After washing his mother's car at Duds 'n' Suds, petitioner decided to go to the gas station to fill up the car before he left town the next day. On the way, petitioner stopped at a red light on Babcock Street at the intersection with 19th Avenue. When the light turned green, petitioner proceeded on Babcock Street through the intersection. At the same time, respondent, a Montana resident, ran the red light on 19th Avenue and collided with the passenger side of petitioner's vehicle. J.A. 13; Pet. App. 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

The collision left petitioner with injuries to his lower back, resulting in severe back pain as well as radiating pain in his leg and hip. Petitioner required physical therapy, steroid injections, and prescription and non-prescription medications to address his injury. J.A. 16; Pet. App. 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

2. On January 26, 2011, petitioner brought suit against respondent in Montana state court, asserting a claim of negligence. Citing diversity of citizenship, respondent removed the case to the United States District Court for the District of Montana. J.A. 6.

The case proceeded to trial before a jury. With the parties' consent, a magistrate judge presided over the trial. Respondent admitted that he was at fault for the accident and that petitioner was injured as a result. Respondent also stipulated that petitioner's past medical expenses, in the amount of $10,136, were reasonable, necessary, and caused by the collision. Pet. App. 2a; Pet. C.A. Br. 9, 11; Resp. C.A. Br. 4, 17.

The trial took place over two days. As a result of respondent's stipulations, the only disputed issue at trial was the amount of any *additional* damages that re-

spondent owed petitioner, including future medical expenses. Petitioner presented evidence that he would continue to need regular physical therapy, injections, and medications to alleviate the pain he was experiencing. Respondent argued that only some of petitioner's future medical expenses were related to the collision and that petitioner would not actually undertake all of the treatment he identified. Respondent further suggested that the jury should award petitioner an amount "somewhere between ten and $20,000" to account for the stipulated past medical expenses and for additional damages. Pet. App. 2a; Pet. C.A. Br. 10-11; Resp. C.A. Br. 17-19.

During deliberations, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36; Pet. App. 2a-3a. The note caused the judge to question whether the jury understood that "their verdict may not be less than that amount," and the judge recognized that a verdict in less than the stipulated amount of damages would be invalid. J.A. 36; Pet. App. 3a. Despite that concern, the judge responded to the note simply by informing the jury that the information it sought was not germane to the verdict. J.A. 37; Pet. App. 3a.

The jury returned a verdict in favor of petitioner (as the verdict form required it to do) but awarded him $0 in damages. Pet. App. 3a, 22a, 24a. The judge promptly thanked the jury for its service and ordered it "discharged," telling the jurors they were "free to go." *Id.* at 25a. The jurors then left the courtroom. *Ibid.*

After the jurors left, petitioner's counsel indicated his intention to make a post-trial motion. Pet. App. 25a. The judge told counsel that he "[would] have plenty of time for post-trial motions" and that he "d[id]n't have to make them right now." *Ibid.* The judge then recessed proceedings. *Ibid.*

3. After recessing, the judge realized that the verdict awarding petitioner $0 in damages was not "legally possible" in light of the stipulated amount of damages. Pet. App. 26a; see Br. in Opp. 3 (conceding that the verdict was invalid). The judge ordered court personnel to stop the jurors and bring them back. Pet. App. 26a, 31a.

Having summoned counsel to chambers, the judge acknowledged the problem with the verdict and suggested two alternatives: (1) filing a motion for new trial, with the result that a new trial would be "mandatory," or (2) re-empaneling the jurors, instructing them to reach a different verdict, and ordering them to deliberate anew. Pet. App. 26a, 28a. Petitioner's counsel strenuously objected to re-empaneling the discharged jurors. *Id.* at 26a-29a. To avoid a new trial, however, the judge decided to "send the jury back into deliberations" to reach a different verdict. *Id.* at 28a. The judge explained that he would "hate to just throw away the money and time that's been expended in this trial." *Ibid.*

Between the time of their discharge and recall by the judge, all of the jurors left the courtroom and were permitted to mingle with non-jurors under no instructions or restrictions from the judge. Pet. App. 25a. Some of the jurors were seen speaking with the court clerk. *Id.* at 26a-27a. Of the seven jurors, two "went down" the hall or stairs from the courtroom. *Id.* at 31a. According to the clerk, at least one of the jurors "left the building to go get his hotel receipt" and bring it back. *Id.* at 28a; see *id.* at 31a (statement by one of the jurors that the juror had gone downstairs, without indicating whether the juror had then proceeded to leave the building).

Upon the jurors' return to the courtroom, the judge asked the jurors as a group whether they "talked to anybody about the case outside [their] immediate numbers," to which they collectively answered no. Pet. App. 31a.

The judge did not question each juror individually or ask what each juror did after the discharge. *Ibid.* The judge then informed the jurors that he was re-empaneling them and would ask the jury to "start over with clarifying instructions." *Ibid.*

The judge instructed the jury that its verdict was "not possible" as a matter of law on the facts of this case. Pet. App. 30a. The judge explained that "it was admitted from the beginning in this case[] that the medical bills of $10,136.75 were caused by this collision," and the verdict "could not fly in the face of that undisputed evidence." *Ibid.* The judge further instructed the jury that its verdict must be "$10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Ibid.*

In response to those instructions, a juror raised his hand and told the judge that, "[h]ad you said that upon sending us into the room, you would have had a different answer." Pet. App. 32a. The juror added that the jury had sought "clarification" on that very point in its note during deliberations but had received no guidance. *Ibid.* The judge disputed the clarity of the jury's note but ultimately "accept[ed] the blame" for "not making this more clear" before the jury delivered its verdict. *Ibid.*

The judge ordered the jurors to return the next morning to deliberate anew. Pet. App. 33a. Petitioner's counsel renewed his objection to recalling the jurors after discharge and moved for a mistrial. *Id.* at 35a. The judge denied the motion. *Id.* at 37a.

The reassembled jury returned a verdict awarding petitioner only $15,000 in damages. Pet. App. 38a, 40a. The district court entered judgment in favor of petitioner in that amount. *Id.* at 21a.

4. Petitioner appealed, contending that the recall of the discharged jurors was impermissible. The court of

appeals affirmed. Pet. App. 1a-17a. It held that a judge may recall jurors for further service in a case after discharging them as long as the judge "make[s] an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a.

At the outset, the court of appeals acknowledged that a jury "[t]ypically * * * is no longer an entity after the court discharges it," and the "protective shield" imposed by the judge during trial, "which prevents jurors from being subjected to prejudicial outside influences, is removed upon dismissal." Pet. App. 6a (internal quotation marks and citation omitted). But the court nevertheless concluded that discharged jurors may be recalled for further service, even if they had the opportunity to mingle and discuss the case with non-jurors during their discharge, as long as the jurors did not encounter prejudicial influences of such magnitude as to prevent them from fairly reconsidering their verdict. See *id.* at 12a.

In so concluding, the court of appeals rejected the "bright-line rule" adopted by the Eighth Circuit "prohibiting recall once the jurors have left the confines of the courtroom" after being discharged. Pet. App. 9a (citing *Wagner* v. *Jones*, 758 F.3d 1030, 1035 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015)). The court of appeals acknowledged that "there are some advantages to the Eighth Circuit's rule": in particular, it "offers better guidance than an amorphous rule," "is more straightforward to apply," and "better protects against improper external influence." *Id.* at 10a, 11a (internal quotation marks and citation omitted). Yet the court of appeals declined to adopt that rule on the ground that, while the "potential for prejudicial influence" exists as soon as jurors have been discharged, particularly "in an age of instant electronic communication," that potential may not

be realized between the time of discharge and recall in a given case. *Id.* at 11a.

In the court of appeals' view, allowing a judge to recall discharged jurors if the judge determined that the jurors were not exposed to outside influences after discharge "strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial." Pet. App. 11a. The court instructed that, in deciding whether to recall discharged jurors, a judge should consider "the totality of circumstances" in order to "determine whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Id.* at 13a (internal quotation marks and citation omitted; alteration in original).

Applying that rule to this case, the court of appeals concluded that recalling the discharged jurors to receive additional instructions, deliberate anew, and reach a different verdict was permissible in this case. Pet. App. 16a-17a. While noting that "an individualized examination [of each juror] would be preferable," the court reasoned that the judge's collective questioning had revealed "no evidence the jury had been tainted by improper influence" during its dismissal. *Id.* at 15a, 16a. The court added that "[the fact] [t]hat the jurors were recalled to deliberate anew upon a substantive matter rather than simply to correct a technical error does not change our conclusion." *Id.* at 16a.[1]

Judge Bea concurred in the judgment. Pet. App. 18a-20a. He agreed that discharged jurors could be recalled

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[1] The court of appeals rejected other arguments for reversal in an unpublished opinion. See J.A. 39-40. Petitioner does not renew any of those arguments in this Court.

absent evidence of undue prejudice, but he disagreed that a judge was affirmatively obligated to inquire into prejudice *sua sponte*. See *id.* at 18a.

## SUMMARY OF ARGUMENT

The discharge of the jury is a pivotal moment in a case. For the jurors, discharge marks the point at which their service as jurors, with its special authority as well as restrictions, is at an end and they return to being ordinary members of the public. For the litigants, discharge marks the point at which certain rights, such as the right to poll the jury, become unavailable and certain time periods, such as the time to move for acquittal, begin to run. And for the district court, discharge marks the point at which the court's authority over the case constricts in significant ways. Simply put, discharge marks the moment when the district court loses the authority to recall the jurors for further service in the case and when the interests in fairness and finality become paramount.

The court of appeals erred in this case when it permitted a federal judge to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew to reach a different verdict. Its judgment should be reversed.

I. A federal court lacks the authority to recall discharged jurors for further service in the same case.

A. Nothing in the federal rules of procedure gives a district court the authority to recall jurors after discharge for further service in a case. In fact, the rules implicitly prohibit district courts from recalling discharged jurors for any type of further service, much less for the purpose of further instructing them and ordering them to deliberate anew to reach a different verdict.

Of particular relevance here, Federal Rule of Civil Procedure 51(b)(3) provides that a district court "may instruct the jury at any time before the jury is discharged." The plain language of the rule withholds authority to instruct jurors after discharge, upon recalling them for further service; the authority to reinstruct the jury and require continued deliberations to correct an invalid verdict expires at the point at which the jury is discharged. Once the jury has been discharged, Civil Rule 59 provides that a new trial is the only remedy for an invalid verdict. Other federal rules, both civil and criminal, similarly presuppose that discharge deprives the district court of authority over the jury and the jury of authority over the case.

B. A district court lacks authority over jurors after discharge for the additional, fundamental reason that jurors return to being ordinary citizens upon discharge. When they are selected for jury service, jurors receive the unique authority to consider the evidence and render a verdict in the case. Upon discharge, the jurors lose that authority over the case and can no longer alter their verdict. Jury service also comes with unique restrictions imposed by the court—on everything from where and when jurors must report for service to what they may discuss during the trial. After discharge, those restrictions fall away and jurors may read, speak, and think freely about the case like any other citizen.

As ordinary citizens, jurors are no longer subject to the authority of the district court outside of the ways in which the court may exercise authority over any other citizen, such as by subpoena or notice of contempt. Those mechanisms are available to a district court for obtaining evidence from jurors about their verdict, but the court does not possess the authority to reconstitute

the former jurors *as a jury* to deliberate anew in the same case.

C. A district court also lacks inherent authority to recall discharged jurors, because such a power fails all three requirements this Court has established to identify the inherent powers of federal courts. *First*, permitting recall for the purpose of further service in a case would circumvent or conflict with a variety of civil and criminal rules. Most notably in this case, permitting recall would contravene the explicit limitation of Civil Rule 51(b)(3). *Second*, there is no long unquestioned history of courts recalling discharged jurors for further service. Quite to the contrary, the evidence from English common law before the Founding and from American practice thereafter demonstrates that courts did not exercise such authority. *Third*, the power to recall discharged jurors is in no way necessary to the exercise of a federal court's other powers. Without the authority to recall discharged jurors, courts would still be able to exercise their core powers to adjudicate cases and enforce judgments, because existing rules already provide ample procedures for remedying an invalid or ambiguous verdict after the jurors have been discharged.

II. The court of appeals ignored the absence of authority to recall discharged jurors and instead fashioned a rule based on its own policy balancing between the interests of fairness and economy. Even if this Court were to employ that mode of analysis, however, the interests in fairness and finality strongly counsel in favor of a bright-line rule against recall—especially in circumstances such as these, where the district court recalled discharged jurors for the purpose of further instructing them and ordering them to deliberate anew and reach a different verdict.

A. In both civil and criminal cases, the recall of discharged jurors implicates the fundamental guarantee of a fair trial in a fair tribunal. After discharge, jurors are free to encounter outside influences, and given the immediacy of modern technology, it is highly likely that they will. Even aside from outside influences, jurors may simply change their minds after discharge, and recall itself presents serious potential for confusion and unintended compulsion. Those dangers are most acute in a situation such as this one, where discharged jurors are recalled for further instruction and deliberation. A bright-line rule forbidding recall in such circumstances protects the fundamental right to a fair trial and preserves public confidence in the fairness of jury verdicts.

B. The recall of discharged jurors for further instruction and deliberation also obviously undermines the finality of jury verdicts. The possibility of recall at some later date to correct an invalid verdict as long as jurors have not encountered unduly prejudicial influences would subject jurors and litigants to indefinite uncertainty. Such adverse consequences are avoided by a bright-line rule against recall.

C. Expediency, the virtue touted by the court of appeals here, does not outweigh the significant fairness and finality interests at stake in recalling discharged jurors for reinstruction and further deliberation. To the contrary, the federal rules of procedure create incentives for parties to identify and correct certain types of errors before the jury is discharged, promoting efficiency. But as to other types of errors—such as the error at issue here, a verdict contrary to the weight of the evidence—the rules create no such obligation, thereby affording the losing party the right to a new trial even if some other remedy would be more efficient. A rule permitting recall of discharged jurors for further instruction and delibera-

tion would fly in the face of the balance already struck by the federal rules. Because a federal court has neither express nor inherent authority to recall discharged jurors for further service, the judgment of the court of appeals should be reversed.

## ARGUMENT

### I. A FEDERAL COURT LACKS THE AUTHORITY TO RECALL DISCHARGED JURORS FOR FURTHER SERVICE IN A CASE

A federal district court does not have the authority to recall jurors after discharge for further service in a case. The federal rules of procedure put certain procedures and remedies beyond the district court's power upon the point of discharge. Specifically, after discharge, a district court has no authority to re-empanel jurors for further proceedings, much less to instruct them further with respect to the case or to order them to engage in further deliberations. Indeed, re-empaneling jurors after discharge would directly conflict with a host of relevant rules.

Nor is there any basis for concluding that a district court somehow has inherent authority to recall jurors after discharge. Historical practice does not support any such claim, and jury recall is not necessary to the exercise of the judicial power, because the federal rules already provide ample procedures for remedying errors that take place before discharge. Because nothing in the federal rules or any other source of judicial authority authorizes district courts to recall discharged jurors for further service in the same case, the court of appeals erred by holding that recall was permissible, and its judgment should be reversed.

### A. The Federal Rules Of Procedure Do Not Permit A District Court To Recall Discharged Jurors

The federal rules of procedure, which are "as binding as any statute duly enacted by Congress," time and again reflect the pivotal importance of jury discharge in the conduct of a case. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). The rules give a district court wide latitude in reaching and correcting a verdict while the jury remains empaneled during a jury trial (and throughout a bench trial). But both the civil and criminal rules constrict a district court's authority in numerous respects upon discharge. After that point, certain procedures and remedies provided by the rules are no longer available to the court.

Of particular relevance here, the Federal Rules of Civil Procedure establish that, when a jury renders an invalid verdict but has not yet been discharged, the court may clarify its instructions and direct the jury to deliberate and reach a different verdict. See Fed. R. Civ. P. 51(b)(3); *Unit Drilling Co.* v. *Enron Oil & Gas Co.*, 108 F.3d 1186, 1191 (10th Cir. 1997). Once the jury has been discharged, the rules provide a different remedy for an invalid jury verdict: a new trial. See Fed. R. Civ. P. 59; *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940). Nothing in the federal rules (or in any source of positive federal law) gives a district court the authority to recall jurors after discharge for further service in a case—much less for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. To the contrary, the rules necessarily imply that a district court is *prohibited* from recalling discharged jurors.

1. In this particular case, the rule of most direct application is Federal Rule of Civil Procedure 51(b)(3). That rule provides that a district court presiding over a

jury trial "may instruct the jury at any time *before the jury is discharged*" (emphasis added). Under the plain language of the rule, even after the jury has begun its deliberations, the court may give additional instructions to aid the jury in reaching a verdict. And if the jury returns an invalid or ambiguous verdict, the district court has the authority to reject the verdict, instruct the jury further, and order the jury to resume its deliberations (or, in the alternative, to declare a mistrial). See *Unit Drilling*, 108 F.3d at 1191; cf. *Clark* v. *Sidway*, 142 U.S. 682, 686 (1892) (upholding a jury verdict where the jury initially left the amount of damages blank on the verdict form).

By contrast, nothing in Civil Rule 51(b)(3) or any other rule authorizes a district court to instruct the jury *after* discharge; Rule 51(b)(3) conspicuously withholds that authority. The undeniable implication is that a district court lacks the authority to instruct a jury after discharge. *A fortiori*, a district court lacks the authority to recall jurors after their discharge for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict—as took place in this case.[2]

2. Other federal rules presuppose that discharge deprives a district court of authority over the jury and the jury of authority over the case. For example, Civil

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[2] While this is a civil case, the corresponding criminal rule is to the same effect. Federal Rule of Criminal Procedure 30(c) provides that a district court "may instruct the jury before or after the arguments are completed, or at both times." See also Fed. R. Crim. P. 30 advisory committee's note (1987) (making clear that "arguments" refers to closing arguments of counsel). Nothing in that rule or any other rule authorizes a district court to instruct the jury after discharge in a criminal case.

Rule 59 governs motions for a new trial. In the case of a bench trial, Rule 59 authorizes a court acting on a new-trial motion to grant the movant's request for a new trial *or* effectively to continue the first trial by "tak[ing] additional testimony, amend[ing] findings of fact and conclusions of law or mak[ing] new ones, and direct[ing] the entry of a new judgment." Fed. R. Civ. P 59(a)(1)(B), (a)(2). In the case of a jury trial, however, Rule 59 authorizes a court acting on a new-trial motion to provide only one form of relief: a new trial. See Fed. R. Civ. P 59(a)(1)(A). Rule 59 withholds from a district court the authority to reopen and resume a jury trial after discharge for the purpose of entering a new judgment. To state the obvious, recalling jurors from the initial trial and ordering them to deliberate anew and reach a different verdict is not the same thing as a new trial—and granting that remedy is therefore contrary to the rule.

In a similar vein, Civil Rule 50(b) gives a district court three options for responding to a motion for judgment as a matter of law that has been renewed after a jury trial. In response to a motion filed within 28 days after entry of judgment—or if the motion addresses an issue concerning the jury not decided by the verdict, within 28 days "after the jury was discharged"—the court may "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." Fed. R. Civ. P. 50(b). Like Rule 59, however, Rule 50(b) does not authorize recalling jurors after their discharge for the purpose of ordering them to deliberate further—much less to deliberate anew in order to reach a different verdict.

In criminal cases, motions for a new trial are governed by Federal Rule of Criminal Procedure 33, which has the same structure as Civil Rule 59. In the case of a bench trial, Criminal Rule 33 authorizes a court acting on

a new-trial motion to grant the movant's request for a new trial *or* effectively to continue the first trial by "tak[ing] additional testimony and enter[ing] a new judgment." Fed. R. Crim. P. 33(a). In the case of a jury trial, however, Rule 33 authorizes the court to provide only one form of relief: a new trial. *Ibid.* As with Civil Rule 59, Criminal Rule 33 expressly confers the authority to continue a bench trial after its completion, but conspicuously does not confer any such authority to continue a jury trial after discharge.

3. Still other federal rules further illustrate the manner in which jury discharge circumscribes a court's authority. Crucially, under both the civil and criminal rules, the district court's authority to poll the jury, whether in response to a party's request or *sua sponte*, terminates when "the jury is discharged." Fed. R. Civ. P 48(c); Fed. R. Crim. P. 31(d). Upon discharge, therefore, the court has no authority to recall jurors for the purpose of conducting a poll. Those rules reflect the principle that a jury retains its ability to alter its verdict as long as the case remains before it; as one court of appeals has put it, polling "gives effect to each juror's right to change his mind about a verdict to which he has agreed in the jury room." *Audette* v. *Isaksen Fishing Corp.*, 789 F.2d 956, 958 (1st Cir. 1986) (internal quotation marks and citation omitted). Once the jury has been discharged, however, its power over the case ends, and polling would be inappropriate.

Finally with regard to the rules, Criminal Rule 29(c) provides that the date of discharge triggers the 14-day time period during which a defendant may move for a judgment of acquittal. This Court has held that a district court lacks the authority to grant an untimely motion for acquittal or otherwise to circumvent the rule's time limit. See *Carlisle* v. *United States*, 517 U.S. 416, 433 (1996).

Bizarrely, however, if a district court were to have the power to recall jurors after discharge, it could render timely an otherwise untimely motion for acquittal through the simple artifice of recalling jurors and then once again discharging them, thereby resetting the clock on the motion. And if a court lacks the authority to recall discharged jurors for the relatively minor task of restarting a time period for filing, a court surely lacks the authority to recall discharged jurors for the much greater task of deliberating anew and reaching a different verdict.

In sum, nothing in the federal rules authorizes a district court to recall jurors after discharge for further service in a case—much less for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. To the contrary, the exercise of such authority by a district court would be contrary to every relevant rule governing the conduct of a case after a jury's verdict.

### B. Upon Discharge, A Juror Returns To Being An Ordinary Citizen

The absence of authority for a district court to recall discharged jurors for further service in a case is consistent with the fundamental principle that discharge marks a juror's return to being an ordinary citizen. Upon discharge, a juror ceases to be a juror. A former juror has no power to issue or modify the verdict in a case, because the power over the case resides not in the individual but in the office of juror. And after discharge, the court possesses only such authority over a former juror as it may lawfully exercise over any other ordinary citizen.

1. As this Court has recognized, "[t]he jury is an essential instrumentality—an appendage—of the court."

*Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks and citation omitted). Upon their selection to serve on a jury, jurors collectively receive the authority to consider the evidence and render the verdict in the case. Jurors exercise that power according to the instructions of the judge and under their oath to decide the case "upon the law and the evidence" alone. United States Courts, *Handbook for Trial Jurors Serving in the United States District Courts* 8 (2012) (Juror Handbook) <tinyurl.com/trialjurors> After discharge, jurors are relieved of their authority over the case and return to being ordinary citizens. At that point, as then-Chief Judge Cardozo famously put it, the jury "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929). As a result, after discharge, former jurors lack the power to alter the verdict that they previously rendered, even if they may now disagree with it.

2. Together with possessing temporarily expanded authority compared to other citizens, jurors have temporarily curtailed rights. During their service, jurors give up some of the usual freedoms enjoyed in ordinary life. Jurors must report to the courthouse for service at the times and dates required by the judge for the duration of their service. Jurors are subject to a variety of instructions from the judge—to avoid press coverage of the case, not to undertake their own investigation into the facts, not to reach conclusions until all the evidence has been presented, and to avoid discussing the case with others and even with each other until they are authorized to begin their deliberations. Jurors may be sequestered to enforce these restrictions or be held in contempt for failing to comply with them. See, *e.g.*, *United States*

v. *Lawson*, 677 F.3d 629, 641 n.16 (4th Cir. 2012); *United States* v. *Bukowski*, 435 F.2d 1094, 1098 (7th Cir. 1970). And members of the public attempting to influence jurors may be subject to criminal liability. See 18 U.S.C. 1503, 1504.

After discharge, however, jurors "return to society to resume their normal lives unfettered by restriction or limitation imposed by the court," *Mohan* v. *Exxon Corp.*, 704 A.2d 1348, 1352 (N.J. Super. Ct. App. Div. 1998), and, as ordinary citizens, are "free to go about their normal affairs," Juror Handbook 14. Specifically, former jurors are freed from the judge's instructions about where they must be, what they can read, with whom they can speak, and how they must think about the case. For example, after discharge, former jurors may read press coverage about the case and discuss the case with others. See *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982). That is because any "interest * * * in shielding jurors from pressure [that occurs] during the course of the trial * * * becomes attenuated after the jury brings in its verdict and is discharged." *Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., Circuit Justice); *United States* v. *Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994); *Journal Publishing Co.* v. *Mechem*, 801 F.2d 1233, 1236-1237 (10th Cir. 1986); *United States* v. *Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).[3]

In addition, after discharge, former jurors are no longer under the judge's authority, except to the same

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[3] To the extent that courts restrict access to former jurors after discharge, it is for their own protection; former jurors retain the ability to waive the restriction. See, *e.g.*, *United States* v. *Brown*, 250 F.3d 907, 921 (5th Cir. 2001). Courts have rejected even those restrictions, moreover, when "there is not a sufficient record of * * * juror harassment." *Antar*, 38 F.3d at 1363.

extent as other ordinary citizens. For example, a district court may punish "[a]ny person," including a former juror, for criminal contempt based on misconduct that occurred during the trial (and may hale a former juror back into court on that basis). Fed. R. Crim. P 42; see *Clark* v. *United States*, 289 U.S. 1, 6 (1933).

Similarly, when a question arises after discharge concerning the jury's verdict, the court may subpoena former jurors as witnesses, just as the court could any person with information relevant to a case. See Fed. R. Civ. P 45; cf. *United States* v. *Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990) (accepting affidavits from former jurors concerning a clerical error in the verdict form). And former jurors, like other ordinary citizens, can testify about historical facts within their knowledge, including certain facts about what they did and observed before discharge. Thus, under the rules of evidence, former jurors may testify about whether "a mistake was made in entering the verdict on the verdict form"; whether "extraneous prejudicial information was improperly brought to the jury's attention"; or whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2).[4] But former jurors may not testify about whether the jury was operating under a misunderstanding about the consequences of their verdict; whether the jury's verdict would have been different under a correct understanding of the instructions or evidence; or whether the former jurors have changed their minds since discharge. See Fed. R. Evid. 606(b)(1); Fed. R. Evid. 606 advisory committee's note (2006); *United States* v. *Stov-*

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[4] The federal rules of procedure provide discrete procedural mechanisms for correcting clerical errors in recording jury verdicts. See Fed. R. Civ. P. 60(a); Fed. R. Crim. P. 36.

*er*, 329 F.3d 859, 865 (D.C. Cir. 2003) (per curiam); *United States* v. *Jones*, 132 F.3d 232, 246 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999); *United States* v. *Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970).

Although a court may exercise power over former jurors after discharge just as it may over other ordinary citizens, what a court cannot do is reconstitute the former jurors *as a jury*—here, for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. That is because, after discharge, the court no longer has authority over the jury, and the jury no longer has authority over the case. A hypothetical amply proves the point. Suppose that the former jurors here simply refused the request by court personnel to return to the courtroom for further proceedings after their discharge. Would they not have been well within their rights to do so? After all, the court had relinquished its power over the jury as a court instrument, and court personnel had no subpoena, arrest warrant, or notice of contempt to compel the former jurors' return. The fundamental principle that discharge marks a juror's return to being an ordinary citizen underscores the oddity of permitting recall for further service in the same case.

### C. A Federal Court Lacks Inherent Authority To Recall Discharged Jurors

This Court has recognized that federal courts have "certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen* v. *United States*, 517 U.S. 820, 823 (1996). But such inherent authority "must be delimited with care" because of the "danger of overreaching when one branch of the Government * * * undertakes to define its own authority." *Ibid.* Members

of the Court have emphasized that "[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 64 (1991) (Kennedy, J., dissenting).

This Court has followed a three-step analysis for determining whether a federal court has a claimed inherent power. *First*, the Court considers whether the claimed inherent power would "circumvent or conflict with" any relevant statutes or rules. *Carlisle*, 517 U.S. at 426; see *Bank of Nova Scotia*, 487 U.S. at 254-255. *Second*, if the claimed inherent power would not fail that test, the Court considers whether there is evidence that the exercise of that power has a "long unquestioned" history. *Carlisle*, 517 U.S. at 426 (quoting *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 631 (1962)). *Third*, if the claimed inherent power has such a history, the Court considers whether the power is "necessary to the exercise" of a federal court's other powers, *Chambers*, 501 U.S. at 43 (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)), and whether the power is sufficiently "limited by the necessity giving rise to its exercise," *Degen*, 517 U.S. at 829.

Here, the claimed power to recall discharged jurors fails all three of these requirements. Because a federal court lacks inherent as well as express authority to recall discharged jurors, the judgment of the court of appeals should be reversed.

1. As discussed above, recalling discharged jurors for further service in a case would "circumvent or conflict with" a variety of civil and criminal rules constricting a federal court's authority upon discharge. See pp. 14-18, *supra*. Most notably in this case, permitting recall for the purpose of further instructing the jurors and ordering them to deliberate anew would conflict with Civil

Rule 51(b)(3), which limits instruction of the jury to "any time *before* the jury is discharged" (emphasis added). Civil Rule 51(b)(3) does not authorize a district court to instruct a jury after discharge. That should be the beginning and end of this case: a district court has no authority, inherent or otherwise, to contravene such an explicit limitation on the timing of an authorized action.

This Court's decision in *Carlisle*, *supra*, is instructive. That case involved Criminal Rule 29(c), which establishes a time period (today, 14 days from discharge) during which a defendant may move for a judgment of acquittal. See 517 U.S. at 420-421. The Court held that the time limit in that rule deprived the district court of the power to grant a motion for acquittal filed just one day late, even though the district court could have extended the filing period before it expired and even though the district court had found that not granting the motion would have resulted in a "grave injustice." *Id.* at 419, 433 (internal quotation marks omitted). Writing for the Court, Justice Scalia explained that the district court's action in granting the motion "contradicted the plain language of Rule 29(c)[] and effectively annulled the [time] limit." *Id.* at 426.

Just as a federal court may not permit the filing of a motion for acquittal outside the specified time period, so too a federal court may not instruct the jury outside the specified time period, either. A federal court has no discretion to disregard an on-point rule and to substitute its own balancing of competing policy concerns for that embodied in the rule. As this Court has explained, "[e]ven a sensible and efficient use of the supervisory power * * * is invalid if it conflicts with constitutional or statutory provisions," including the federal rules of procedure. *Bank of Nova Scotia*, 487 U.S. at 254 (internal quotation marks and citation omitted). Yet that is pre-

cisely what the court of appeals did in adopting its rule permitting recall for further service in the same case. Cf. Pet. App. 11a (adopting rule because it "strikes a sensible balance between considerations of fairness and economy").

2. In addition, there is no "long unquestioned" history of courts recalling discharged jurors for further service in a case. To the contrary, the evidence indicates that courts historically did not exercise such authority. While some courts have more recently allowed recall (in the decisions giving rise to the conflict at issue here), even those modern decisions fall far short of establishing the "wide usage" required for recognition of an inherent power. *Link*, 370 U.S. at 631.

a. Even before the Founding, the recall of discharged jurors was not permitted at common law. That principle can be traced at least to a decision from the Court of Exchequer during the reign of James I, which concluded that, "when a jury returned by force of any *venire facias* to try an issue, has given a verdict which is accepted and recorded by the Court; be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue." *Loveday's Case*, 8 Coke Rep. 65b, 65b, 77 Eng. Rep. 573 (1608). If the verdict were "so imperfect that judgment cannot be given upon it, then the Court shall award a *venire facias de novo*, to try the said issue by others." *Id.* at 65b-66a. Citing that decision and others, a leading treatise on English law stated the principle as follows: "A jury once discharged after giving a verdict upon which judgment has been entered cannot be recalled to rectify the same, but there must be a new trial if the court considers that injustice has been done." 18 Lord Halsbury, *Laws of England* § 632, at 258 (1911).

After the Founding, American courts continued to adhere to the principle that recall of discharged jurors was not permitted. For example, in *Mills* v. *Commonwealth*, 34 Va. 751 (1836), the General Court of Virginia awarded the defendant a new trial after holding that the verdict of a recalled jury must be set aside. See *id.* at 752. After the clerk read the jury's verdict finding the defendant guilty of grand larceny, the trial court had erroneously discharged the jury before it could determine a term of imprisonment. See *id.* at 751. The jurors "were called back instantly"; much like here, most of the jurors were still in the courthouse, but one had left the courthouse by "perhaps * * * forty or fifty yards," "accidentally accompanied" by a deputy sheriff. *Id.* at 751-752. After the judge reassembled the jury and sent it out to deliberate further, the jury returned a two-year term of imprisonment. See *id.* at 752. The General Court of Virginia held that the verdict must be set aside and the case remanded for a new trial because of the trial court's error in recalling the discharged jurors. See *ibid.*

Similarly, in *Sargent* v. *State*, 11 Ohio 472 (1842), the Ohio Supreme Court held that "in no case can [the court] be permitted to recall a jury to alter or amend their verdict after it has been received and the jury discharged." *Id.* at 474. The trial court had recalled discharged jurors after the jury failed to render a verdict on one of the two counts. See *id.* at 472. The Ohio Supreme Court explained that permitting recall "would jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen." *Id.* at 474; see *Brister* v. *State*, 26 Ala. 107, 132 (1855); *Snell* v. *Bangor Steam Navigation Co.*, 30 Me. 337, 339 (1849).

b. Other rules and practices at common law confirm there is no "long unquestioned" history of courts recalling discharged jurors for further service in a case.

i. Under English common law at the time of the Founding, a jury was typically not permitted to amend a verdict after the verdict was recorded or after the jury was discharged. See 2 Edward Coke, *The First Part of the Institutes of the Laws of England* § 366, at 227b (16th ed. 1809) (Coke); Francis Wharton, *Criminal Pleading and Practice* § 751, at 492-493 (8th ed. 1880); John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 152 (15th ed. 1862). In *Jackson* v. *Williamson*, 2 Term Rep. 281, 100 Eng. Rep. 153 (1788), the King's Bench refused to amend a jury's verdict when the jurors subsequently stated that they had intended to award a larger sum to the plaintiff. See *id.* at 282. Even in a case in which an English court did permit the correction of a "clear mistake" in reporting the verdict by means of juror affidavits, the court did not suggest that the jury could be reassembled to continue deliberations or to amend a correctly reported verdict. *Cogan* v. *Ebden*, 2 Keny. 24, 25, 96 Eng. Rep. 1094 (K.B. 1757).

After the Founding, American courts maintained the general rule forbidding the amendment of verdicts. In *Little* v. *Larrabee*, 2 Greenl. 37 (Me. 1822), the jurors indicated by affidavit that the verdict written and signed by the foreman was mistaken. See *id.* at 38. The Maine Supreme Judicial Court held that, if a verdict was defective in a matter of form (for example, because of a "clerical mistake[]"), a court could correct it. *Ibid.* But if the jury erred in matter of substance—"either by returning a verdict against the wrong party" or "for a larger or smaller sum than they intended"—a court could not amend the verdict but could only set aside the verdict

and order a new trial. *Id.* at 39-40; see *Walters* v. *Junkins*, 16 Serg. & Rawle 414, 415-416 (Pa. 1827).

ii. At common law, a jury was kept together in seclusion for the duration of deliberations. See 3 Francis Wharton & James M. Kerr, *A Treatise on Criminal Procedure* § 1668, at 2094-2098 (10th ed. 1918) (Wharton & Kerr); 3 William Blackstone, *Commentaries on the Laws of England* 375-376 (1768) (Blackstone); *Commonwealth* v. *M'Caul*, 3 Va. (1 Va. Cas.) 271, 305-306 (Va. Gen. Ct. 1812) (granting new trial where strict segregation was not maintained even though "there might be and probably was no tampering with any juryman in this case"). In fact, the principle of jury segregation was so sacrosanct that, if the jury had not reached a verdict by the time the judge was scheduled to leave town, the judge had the authority to carry the jurors around the circuit with him in a cart until their deliberations were complete. See 3 Blackstone 376. Although the practice of jury sequestration has been relaxed, the basic principle that a jury must be protected from even the possibility of outside influence for the duration of deliberations survives today through the court's instructions to the jury, which expire upon discharge.

iii. Under English common law at the time of the Founding, if a jury failed to reach a unanimous verdict, the court could not recall the original jurors but instead was required to order a new trial before a new jury. A decision from shortly after the Founding, *Rex* v. *Wooler*, 6 M. & S. 366, 105 Eng. Rep. 1280 (K.B. 1817), is instructive. In that case, the King's Bench ordered a new trial because the evidence indicated that not all of the jurors had been able to hear and assent to the verdict as read. See *id.* at 368-369. The judges rejected the argument that the jurors could be re-empaneled to issue a verdict

and instead held that the only option was a new trial. See *id.* at 375-376, 377.

In so concluding, one judge stressed the appearance of impropriety that would result from recalling the jurors: "In no instance that I am aware of can it arise that the same jury should be suffered to re-assemble to consider the same question after they have been mixed with the multitude. If the [c]ourt were to suffer that to be done, what animadversions might well be made upon it by the enlightened part of society!" *Wooler*, 6 M. & S. at 375 (Lord Ellenborough, C.J.). Another judge emphasized that it was "out of [the trial court's] power" to recall the jurors, noting that "the [c]ourt has no process by which it can order the same twelve persons to be assembled again to rehear the case[] and reconsider their verdict." *Id.* at 377 (Abbott, J.).

iv. Finally with regard to the historical practice, the point of discharge was talismanic at common law and affected the operation of a variety of other rules and practices. For example, in civil cases, if the plaintiff did not appear in court to receive the verdict, the jury was discharged and "the action [was] at an end." 3 Blackstone 376. In addition, in civil and criminal cases alike, it was a crime to submit to a juror any information about the case except with the sanction of the court and in the presence of both parties, and it was also a crime for a juror knowingly to participate in such communication. See Wharton & Kerr § 1656, at 2087. Those rules and practices, along with many others, reflect an overarching understanding that discharge constituted the end of a jury's service in a case; they certainly do not support a "long unquestioned" history of juries continuing to provide service in cases after discharge.

c. As explained at greater length in the petition for certiorari (at 8-15), even in the modern era, the clear ma-

jority of courts to have considered the issue have rejected a rule permitting jury recall, confirming that there is no "long unquestioned" history of courts recalling discharged jurors. See *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926); *Wagner* v. *Jones*, 758 F.3d 1030, 1035-1036 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015); *T.D.M.* v. *State*, 117 So. 3d 933, 938-940 (Ala. 2011); *Spears* v. *Mills*, 69 S.W.3d 407, 410-414 (Ark. 2002); *People* v. *Hendricks*, 737 P.2d 1350, 1358-1360 (Cal. 1987); *Montanez* v. *People*, 966 P.2d 1035, 1036-1037 (Colo. 1998); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *West* v. *State*, 92 N.E.2d 852, 855 (Ind. 1950); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 802-805 (Mont. 2006); *Sargent* v. *State*, 11 Ohio 472, 473-474 (1842); *Harrell* v. *State*, 278 P 404, 406 (Okla. Crim. App. 1929); *Commonwealth* v. *Johnson*, 59 A.2d 128, 130 (Pa. 1948); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *State* v. *Nash*, 294 S.W.3d 541, 550-553 (Tenn. 2009); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Melton* v. *Commonwealth*, 111 S.E. 291, 293-294 (Va. 1922); *Yonker* v. *Grimm*, 133 S.E. 695, 697-698 (W Va. 1926).[5] Those decisions are sufficient to refute any argument that the authority to recall

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[5] For purposes of considering whether the exercise of a claimed inherent power has a "long unquestioned" history, this Court has consulted both federal and state decisions. See *Link*, 370 U.S. at 631.

discharged jurors is a power of sufficiently "wide usage" to be part of a federal court's inherent authority.[6]

3. Even if no rule forbade the exercise of the claimed power to recall discharged jurors and there were sufficient historical support for its existence, the claimed power would still fail the third requirement for an inherent power: namely, whether the power is "necessary to the exercise" of a federal court's other powers and is sufficiently "limited by the necessity giving rise to its exercise."

This Court has recognized a limited range of powers that satisfy the requirement of necessity, such as the powers of a court to control its docket, see *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997); to appoint a special master, see *In re Peterson*, 253 U.S. 300, 312 (1920); and to sanction a litigant for bad-faith conduct, see *Chambers*, 501 U.S. at 42-46. Notably, each of those powers is addressed to the essential functioning of the court and the enforcement of its decrees.

The claimed power to recall discharged jurors serves no such purpose. Without the power to recall discharged jurors, a court would still be able to exercise its core powers of adjudicating cases, correcting errors, entering final judgments, and enforcing awards. That is because, even absent the power to recall discharged jurors, exist-

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[6] The vast majority of courts to have held that recall after discharge is not permitted have taken a functional view of "discharge," drawing the line at the point at which the discharged jurors leave the judge's presence and control. See Pet. 9-11, 14-15. A minority of courts have taken a more formal view, drawing the line at the point at which the judge announces the jury's discharge. See Pet. 14-15. The Court need not resolve any open question concerning the precise definition of "discharge" in this case, because it is undisputed that the jurors here were discharged under any conceivable understanding of the term. See Br. in Opp. 3-4.

ing rules already provide ample procedures for remedying an invalid or ambiguous verdict after the jury has been discharged: most notably, a new trial. See Fed. R. Civ. P 59; Fed. R. Crim. P 33. As one member of this Court has succinctly put it, "at the very least a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end." *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting). There can be no serious dispute that the mechanisms for addressing problems with invalid and ambiguous verdicts are sufficient.

The court of appeals in this case seemingly concluded that the power to recall discharged jurors was justified by considerations of expediency: specifically, because recalling discharged jurors provided "a cost-effective alternative to an expensive new trial." Pet. App. 11a. But petitioner is unaware of any case in which this Court has held that considerations of expediency are sufficient to give rise to inherent authority. Cf. *Degen*, 517 U.S. at 827 (citing the "existence * * * of alternative means" of addressing the underlying problem in refusing to recognize a claimed inherent power); *Carlisle*, 517 U.S. at 436 (Ginsburg, J., concurring) (citing the availability of appeals and postconviction proceedings in refusing to recognize an inherent power to consider an untimely motion to acquit). Were it otherwise, inherent authority would quickly cease to be a narrowly confined "exception" to the rule that the authority of a federal court must be conferred by some source of positive federal law. See *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting).

In short, because none of the requirements for inherent authority is satisfied here, there is no authority for a federal court to recall discharged jurors for further ser

vice in a case. The judgment below should therefore be reversed.

## II. A BRIGHT-LINE RULE AGAINST RECALLING DISCHARGED JURORS FOR FURTHER INSTRUCTION AND DELIBERATION IS APPROPRIATE TO PROMOTE THE INTERESTS IN FAIRNESS AND FINALITY

Rather than considering the question in terms of whether a federal court has the authority to recall discharged jurors, the court of appeals engaged in legislative-style policy balancing, concluding that a rule permitting recall "strikes a sensible balance between considerations of fairness and economy." Pet. App. 11a. For the reasons stated above, that was the wrong mode of analysis; the court of appeals should have held that a federal court lacks the authority to recall discharged jurors, and stopped there.

Should this Court determine that the court of appeals correctly engaged in balancing, however, it should conclude that the court of appeals got the balance wrong—at least where, as here, the district court recalled discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict. Such cases pose a particular threat to the fairness and finality interests implicated by jury recall more generally. In the event this Court were to conclude that there is a valid basis for a federal court's exercise of authority to recall discharged jurors, therefore, it should at a minimum establish a bright-line rule, as a matter of "sound judicial practice," that recall is not permitted in these circumstances. *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004) (citation omitted).

### A. A Bright-Line Rule Promotes The Interest In Fairness

1. To begin with, the recall of discharged jurors raises profound concerns about the basic fairness of jury trials in both civil and criminal cases.

Upon discharge, jurors are no longer bound by their oath or by the judge's instructions and may be exposed to outside influence—whether in the form of opinions about the case or additional evidence. At the point of discharge, "jurors are quite properly free to discuss the case with whomever they choose," and even passing interactions can affect them. *United States* v. *Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994). Nor are those interactions limited to mere strangers: parties that were actually involved in the case, including litigants, attorneys, witnesses, court personnel, and members of the press, may speak to (or attempt to speak to) jurors after discharge. Discharged jurors are also free to read press coverage about the case or to investigate facts not in the trial record. And of course, in order to do any of these things, all jurors need do upon discharge is to whip out their smartphones—allowing them to make phone calls, surf the Internet, access social media, and send and receive messages. "In this age of instant individualized electronic communication and widespread personal control and management of pocket-sized wireless devices," it is no exaggeration to say that most modern-day jurors connect with sources of potential taint almost immediately upon discharge. *Wagner*, 758 F.3d at 1035; cf. Pet. App. 31a (asking only whether the jurors "*talked* to anybody about the case outside [their] immediate numbers" (emphasis added)).

Even if they are not subject to outside influence, moreover, jurors may simply change their minds after delivering the verdict and being discharged from service

in the case. See *Wagner*, 758 F.3d at 1036. Delivering a verdict, and observing the reactions to it, are themselves psychologically significant events, and the finality of the verdict itself (or a sense of failure at not reaching a verdict) can have a meaningful effect on the thinking of discharged jurors. See, *e.g.*, *Gugliotta* v. *Morano*, 829 N.E.2d 757, 764 (Ohio Ct. App. 2005). Merely having additional time to reflect—during which the jurors are no longer in service and no longer under instructions from the judge regarding proper and improper considerations—may induce changes of heart, bring to mind forgotten evidence, or convince jurors that they capitulated to the majority too quickly.

In addition, recall itself presents "serious potential for confusion, unintended compulsion and, indeed, coercion" of discharged jurors. *Wagner*, 758 F.3d at 1036. Giving "a vacillating juror an opportunity to reconsider" after discharge is fraught with peril, "especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions." *Ibid.* That is particularly true where, as here, recall is necessary for the purpose of providing further instruction that was not provided before the jury's discharge (as the relevant federal rules of procedure require).

As a consequence, the recall of discharged jurors implicates the fundamental guarantee of "a fair trial in a fair tribunal," as embodied in the specific constitutional rights to a jury trial as well as the broader right to due process. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (internal quotation marks and citation omitted); see *Nash*, 294 S.W.3d at 553; *Hendricks*, 737 P.2d at 1358. Recall also has implications for preserving the perception of fairness in the judicial system, because it is a "paramount consideration" that a jury must be

"free from even the appearance of taint or outside influences." *Spears*, 69 S.W.3d at 413.

2. A bright-line rule forbidding the recall of discharged jurors for further instruction and deliberation protects the fundamental right to a fair trial as well as "the need to maintain confidence in the sanctity of jury verdicts." *Pumphrey*, 135 P.3d at 804. Where, as here, a court seeks to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict, the dangers set out above are at their most acute, and the actuality or appearance of fairness is necessarily compromised. The very fact that the jurors have ceased to be a properly constituted jury renders invalid a subsequent verdict resulting from further deliberation.

In that sense, this case is no different from cases involving decisions by other types of improperly constituted tribunals—whether indictments issued by improperly constituted grand juries, verdicts rendered by improperly constituted petit juries, or judgments entered by improperly constituted appellate panels. In all of those situations, the resulting decision is void without regard to whether there was undue prejudice from the improper constitution of the tribunal. See *Nguyen* v. *United States*, 539 U.S. 69, 81-82 (2003); *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986); *Davis* v. *Georgia*, 429 U.S. 122, 122 (1976) (per curiam); *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 690 (1960).

So too here, a different verdict issued by discharged and re-empaneled jurors is invalid because they are no longer a properly constituted tribunal. Neither the jurors' eligibility to render the initial verdict in this case nor the absence of undue prejudice during their dis-

charge is sufficient to ensure the actuality and appearance of fairness.

3. Under the rule adopted by the court of appeals in this case, a court would have to engage in a case-by-case determination of whether the discharged jurors encountered prejudicial influences of such magnitude as to prevent them from fairly reconsidering their verdict. See Pet. App. 12a. As a preliminary matter, there can be little dispute that a bright-line rule forbidding recall in these circumstances would "offer[] better guidance [to lower courts] than an amorphous rule" such as that adopted by the court of appeals. *Wagner*, 758 F.3d at 1035.

But more broadly, the court of appeals' rule overlooks the fundamental shift that occurs when jurors are discharged. There is "a marked difference between an admonished jury" that leaves the judge's supervision with a case still under consideration and one that leaves the judge's supervision "under the impression that the case is over and their duties complete." *Wagner*, 758 F.3d at 1035 n.9. While jurors remain empaneled, they "are presumed to follow the court's instructions" and thus to avoid outside influences. *CSX Transportation, Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam). In that situation, judicial inquiry can be effective in identifying and addressing any episode of potential taint.

After jurors are discharged, however, they return to being ordinary citizens and are free to do and think as they please. At that point, their function as jurors has come to an end, and the oath and instructions that limit their conduct are lifted. Episodes of potential taint are no longer isolated nor simple to identify—after all, they are perfectly legitimate at the time they occur—and they affect every discharged juror. And the effects of discharge and recall may not be apparent even to the ju-

rors-turned-citizens-turned-jurors themselves. There is little reason to believe that an inquiry into prejudice after discharge would be adequate to address the problem. Because the recall of discharged jurors for further instruction and deliberation compromises the actuality or appearance of fairness, it is appropriate to prohibit recall in those circumstances.

### B. A Bright-Line Rule Promotes The Interest In Finality

The recall of discharged jurors for further instruction and deliberation also undermines the finality of jury verdicts, to the detriment of litigants, jurors, and the judicial system. A bright-line rule prohibiting recall in such circumstances promotes the interest in finality.

Recall interferes with finality for obvious reasons. Under the court of appeals' approach (or any other approach that authorizes courts to recall discharged jurors for further instruction and deliberation), a jury's verdict could remain subject to challenge, and change, indefinitely. As long as a judge determines that jurors can return to the case without undue prejudice—whether it be minutes, hours, days, weeks, or months later—the judge could reopen the verdict, whether *sua sponte* or on a motion from a disappointed litigant. The court of appeals' approach would replace the adage "it ain't over till it's over" with the adage "it ain't ever over."

Take this case as an example. The judge recalled the discharged jurors because he recognized that the verdict was contrary to the evidence and the law, making "a new trial * * * mandatory." Pet. App. 28a; see *id.* at 26a. Here, the judge recognized the problem with the verdict on the same day that the jury rendered it. But suppose the judge had failed to do so. Civil Rule 59 gives the losing party 28 days in which to seek a new trial. See Fed.

R. Civ. P. 59(b).[7] Under a rule authorizing recall to permit the original jury to reach a different verdict from its initial, invalid verdict, it is conceivable that the judge, upon receiving petitioner's promised motion for a new trial, could have responded to the motion by reconstituting the original jury, rather than constituting a new one. Indeed, it is conceivable that a party could itself file a motion to recall the jury at some unspecified point after the initial verdict, regardless of the constraints on other types of post-trial motions.

That way madness lies. Under the court of appeals' approach, jurors—after being told that their service has ended—could be haled back into court indefinitely for a potentially extended period of further service in the case. But jury service is not a life sentence, and nothing in the rules or any other source of positive federal law suggests otherwise. Instead, the rules support the conclusion that a jury's functions, including its power to alter its verdict, are over when the jury has been discharged. A bright-line rule thus promotes not only fairness, but also finality.

### C. Any Interest In Expediency Does Not Outweigh The Interests In Fairness And Finality

As noted above, the court of appeals' primary justification for allowing a judge to recall discharged jurors for further instruction and deliberation was that recall provided "a cost-effective alternative to an expensive new trial." Pet. App. 11a. Mere expediency, however, does not outweigh the significant fairness and finality interests at stake. As a preliminary matter, it is far from clear that recall would always be a more efficient alter-

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[7] In some circumstances, Criminal Rule 33 gives a defendant up to *three years* to move for a new trial. See Fed. R. Crim. P. 33(b)(1).

native than other procedures for remedying an invalid or ambiguous verdict.

But even if it were, the judicial system does not pursue expediency at all costs. As discussed above, the federal rules of procedure specify certain remedies for errors that occur at trial before discharge. While jurors remain empaneled in a case, they may be reinstructed, may return to their deliberations, and may even reach a different verdict. See Fed. R. Civ. P. 48(c), 51(b)(3); Fed. R. Crim. P. 30(c), 31(d). Those rules create incentives for parties to identify and correct certain types of errors while the jury remains empaneled. For example, "[i]t is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury," so as to ensure that the court has "the option of re-submitting the questions to the jury after some further instruction." *Kosmynka* v. *Polaris Industries, Inc.*, 462 F.3d 74, 83-84 (2d Cir. 2006) (citing cases); see Fed. R. Civ. P. 49.

As to other types of errors, however, parties are under no such obligation, and the federal rules of procedure provide other remedies. Of particular relevance here, Civil Rule 59 gives the losing party 28 days after the entry of judgment to object to a jury's verdict on the ground that it was contrary to the weight of the evidence. See Fed. R. Civ. P. 59; *Montgomery Ward*, 311 U.S. at 251. That is why petitioner was under no obligation to bring the jury's error to the court's attention before discharge (if anything, it was respondent who should have had every incentive to do so).[8] The rules and obligations of the federal system are structured in such a

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[8] Immediately after discharge, petitioner's counsel did indicate his intention to file a post-trial motion. See Pet. App. 25a.

way as to afford the losing party the right to obtain a new trial, even if it would be more efficient in some circumstances to permit the original jury to correct its initial error.

In sum, a rule permitting recall of discharged jurors for further instruction and deliberation would not only flout considerations of fairness and finality; it would fly in the face of the balance already struck by the federal rules of procedure. Because a federal court has neither express nor inherent authority to recall discharged jurors for further service in a case, the judgment of the court of appeals cannot stand. That judgment should be reversed, and the case remanded for a new trial.

## CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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No. 15-458

IN THE

# Supreme Court of the United States

ROCKY DIETZ,

*Petitioner*,

v.

HILLARY BOULDIN,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## QUESTION PRESENTED

The question as presented in the petition for a writ of certiorari is:

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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IN THE

# Supreme Court of the United States

No. 15-458

ROCKY DIETZ,

*Petitioner*,

v.

HILLARY BOULDIN,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V

## STATEMENT

1. On August 9, 2009, respondent Hillary Bouldin ran a red light at an intersection in Bozeman, Montana, and struck the passenger side of a car driven by petitioner Rocky Dietz. Pet. App. 2a; 04/16/13 Tr. 34-38, Dist. Ct. ECF No. 103. In 2011, Dietz sued Bouldin in Montana state court for negligence, seeking damages for "injuries including to his low back." Pet. App. 2a; J.A. 11. Based on the parties'

diverse citizenship, Bouldin removed the case to federal district court. J.A. 11.[1]

Before trial, Bouldin admitted that he was at fault, and that Dietz was injured in the collision. Pet. App. 2a; 04/17/13 Tr. 151, Dist. Ct. ECF No. 102. The parties also agreed that Dietz had incurred $10,136.75 in medical expenses because of the accident. Pet. App. 2a; 04/17/13 Tr. 227, 242, 257 The only issue in dispute at trial was how much Bouldin owed in additional damages, such as for pain and suffering and future medical expenses. 04/17/13 Tr. 244.

For two days in April 2013 in a small courthouse in Butte, Montana, the parties presented their evidence and arguments to a seven-member jury. J.A. 7-8. The evidence established that Dietz had various pre-existing conditions caused by numerous other incidents—including one just ten months before the accident in Bozeman, when he was dropped seventeen stories in an elevator. 04/16/13 Tr. 10, 56-57 Bouldin contested the extent to which Dietz's ongoing pain was the result of the car accident, as opposed to those previous incidents. Pet. App. 2a.

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[1]Dietz was a citizen of North Dakota and Bouldin was a citizen of Montana. Notice of Removal 2, Dist. Ct. ECF No. 1 (July 13, 2011). Because Bouldin was a citizen of the State in which Dietz brought the action, removal of the action to federal court was improper under 28 U.S.C. § 1441(b)(2). Dietz, however, waived this non-jurisdictional defect by failing to raise it within 30 days of removal. *See* 28 U.S.C. § 1447(c); *Lively* v. *Wild Oats Mkts., Inc.*, 456 F.3d 933, 942 (9th Cir. 2006). The defect did not affect the District Court's subject-matter jurisdiction over this case. *See* 28 U.S.C. § 1332(a)(1); *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972).

Bouldin also disputed how much medical treatment Dietz would actually require going forward. *Id.*

After the close of evidence, the District Court instructed the jury that the parties were bound by their admissions. 04/17/13 Tr. 222. During closing arguments, Bouldin's counsel reminded the jury of Bouldin's admission that Dietz was injured in the accident, *id.* at 227, and even went so far as to underscore that the $10,136 in past medical expenses were not in dispute: "Award those to Mr. Dietz. You should. That's your obligation under the law." *Id.* at 242. After acknowledging that Bouldin was "also responsible for other damages like pain and suffering, future treatment if you feel some is needed, and lost course of life," *id.* at 227-228, Bouldin's counsel suggested a total award "somewhere between ten and $20,000, depending on what you feel his relief is, what level of pain he has, and how his condition has been affected by this automobile accident." *Id.* at 244.

After the jury retired to deliberate, it sent a question to the court: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36. Discussing the note with counsel, the court speculated: "If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial." *Id.* The court wondered whether the jurors "underst[ood] clearly, after the argument and the instructions, that their verdict may not be less than that amount." *Id.* Bouldin's counsel said he thought he had made that "crystal clear." J.A. 37 The court agreed, and Dietz's counsel did not voice any contrary view. *Id.* With the explicit consent of both sides' counsel, the

court responded to the jury: "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." J.A. 36-38.

The jury returned a verdict finding for Dietz but awarding him $0 in damages. Pet. App. 24a. Dietz's counsel declined to have the jury polled, and made no objection whatsoever to the verdict. *Id.* at 25a. The court then thanked the jurors and declared: "You're free to go. The jury's discharged." *Id.*

The jury left the courtroom. *Id.* Only then did Dietz's counsel ask to make a post-trial motion. *Id.* The court responded that there would be "plenty of time for post-trial motions" later. *Id.* The court then stood in recess. *Id.*

After a "fairly quick second thought," the court recalled the jurors. *Id.* at 26a. A "few minutes" had passed since the jurors had been told they were discharged. *Id.* at 31a. Speaking with counsel outside the jury's presence, the court explained that it had "just stopped the jury from leaving the building," after realizing that the $0 verdict was not "legally possible in view of stipulated damages exceeding $10,000." *Id.* at 26a. The court suggested "sending the jury back for continuing deliberations" "in the hopes" of avoiding the need for a new trial. *Id.*

Dietz's counsel only then objected. While acknowledging that the verdict was "obviously" "contrary to the undisputed evidence and the law," he argued that the jury was not capable of returning "a fair and impartial verdict at this point." *Id.* Dietz's counsel also said he thought he had seen jurors speaking with the clerk of the court following their dismissal, though he was "not at all" suggesting that they had

discussed the case. *Id.* at 26a-27a. The court reiterated that "none of [the jurors] had left the building," and asked the clerk whether any had "even left the [second] floor," where the courtroom was located. *Id.* at 28a. The clerk responded: "There was one that left the building to go get his hotel receipt * * * and to come bring it back." *Id.*

The court decided to "send the jury back into deliberations" with instructions that its verdict had to include "the medical bills plus a reasonable amount * * * for general damages." *Id.* The court did not wish "to just throw away the money and time that's been expended in this trial," *id.*, and so it rejected Dietz's request for a new trial and "a second bite at the apple." *Id.* at 29a.

After the jurors retook their seats, the court explained that their verdict was "not possible * * * under the law and the facts of this case." *Id.* at 30a. Given Bouldin's admissions that the accident had caused Dietz to incur $10,136.75 in medical expenses and to suffer "some injury," the court instructed the jury that its "verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.*

The court proceeded to *voir dire* the jurors. It asked the jurors whether they had spoken to anyone outside their "immediate numbers" about the case, and they answered "[n]o." *Id.* at 31a. One of the jurors explained that "[m]ost" of them had gone only "just outside the door" of the courtroom. *Id.* The court then expressed its understanding that "one juror had gone to the first floor," "maybe to get a hotel receipt." *Id.* A juror responded that he "did that," but "didn't talk to anybody." *Id.* When the

court addressed that particular juror individually, the juror again confirmed that he had not been "contaminated by any outside information." *Id.*[2]

Upon completing the *voir dire*, the court ordered the jury to re-deliberate and reach a verdict consistent with its clarifying instructions. *Id.* at 31a-33a. Because the court was "not equipped for a night session," it told the jurors that they would have to come back the following morning. *Id.* at 33a.

The next day, outside the jury's presence, Dietz moved for a mistrial. *Id.* at 35a-36a. The court denied the motion. *Id.* at 37a. The jury then completed its deliberations and returned a new verdict, awarding Dietz a total of $15,000 in damages. *Id.* at 38a, 40a. In accepting the verdict, the court, which had listened to all of the evidence during the preceding days, remarked that it was "satisfied we have had a fair and impartial jury, as well as an intelligent jury." *Id.* at 39a.

2. Dietz appealed, arguing that recalling the jury "impair[ed] [his] fundamental right to an unbiased jury trial." Dietz C.A. Opening Br. 21. The Court of Appeals for the Ninth Circuit held that "a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Pet. App. 12a. "The court—and, if permitted by the court, counsel—can specifically

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[2]Unfortunately, Dietz's brief obscures this fact. *See* Dietz Br. 6 (asserting that the court "did not question each juror individually").

question the jurors" and, "through its evaluation of their responses and observations of the courtroom, determine whether recall is appropriate." *Id.* at 11a. This case-specific approach, the Court of Appeals concluded, "strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial." *Id.*

Turning to the facts of this case, the Court of Appeals upheld the District Court's finding that the jurors were not "in fact exposed to prejudicial outside influences during the brief period of the dismissal." *Id.* at 13a. The Court of Appeals pointed specifically to the District Court's colloquy with the jurors during *voir dire*, which "support[ed] the conclusion [that] the jury had not dispersed and interacted with any outside individuals, ideas, or coverage of the proceedings." *Id.* at 15a (internal quotation marks and brackets omitted). Accordingly, the Court of Appeals affirmed. *Id.* at 17a.

Judge Bea concurred in the judgment. Although he agreed with the majority's legal standard, he would not require a court to undertake a *sua sponte* inquiry into whether the jurors were exposed to outside influences. *Id.* at 18a-20a.

This Court granted certiorari.

## SUMMARY OF ARGUMENT

In his merits brief in this Court, Dietz has abandoned any claim that recalling the jury in this case violated his constitutional right to an unbiased jury. Taking an entirely different tack from his briefing below and certiorari petition, he now asserts that the District Court lacked authority for its actions under the Federal Rules of Civil Procedure, and that even if

the District Court had authority, this Court should exercise its supervisory powers to impose a new rule, reversing the judgment below. Dietz has forfeited these claims, and they are meritless in any event.

I. To begin, Dietz's new claims are not properly before this Court. In the courts below, Dietz argued that the jury, after being recalled, could not render a fair and impartial verdict under the Constitution. In his petition for certiorari, filed with the help of new counsel, Dietz continued to represent that the case presented a federal constitutional question, which had divided federal as well as state courts.

Having persuaded this Court to grant review, Dietz now changes course, arguing for the first time that the District Court lacked authority to recall the jury under the Federal Rules—rules that were never addressed below, and that of course do not even apply in the state courts Dietz asserted were part of the split in authority. Dietz may have come to realize that the constitutional claim he raised below was meritless, but that does not excuse this bait-and-switch. The writ should be dismissed as improvidently granted.

II. Dietz's new claims lack merit anyway. What a court can do, it has the inherent power to undo—particularly when necessary to ensure a just result and save time and resources. That is the power the District Court exercised here. After pronouncing the jury discharged, the court realized that the jury's verdict was invalid as a matter of law. So the court took the modest step of undoing its pronouncement of discharge, recalling the jury to render a new verdict and avoid a costly new trial.

Federal courts have exercised the inherent power to recall a jury for well over a century, and there is no indication whatsoever that the Federal Rules were intended to abrogate that long line of decisions. Those rules are simply silent on whether a court may undo a discharge. And so they do not divest a court of its inherent power to recall a jury—just as they do not disturb a court's inherent power to reopen the evidence after it has been closed, or recall the mandate after it has been issued.

Dietz disputes the historical support for the inherent power the District Court exercised here. But most of the decisions he cites reversing jury recalls rest on concerns about juror impartiality, not on any purported lack of judicial authority. Moreover, this Court's precedent makes clear that the guarantee of juror impartiality is derived from the Federal Constitution, which demands only that a jury be free of actual prejudice—a standard undisputedly met here.

Dietz's remaining counterarguments are equally unavailing. He contends that the District Court's actions were not absolutely necessary, but this Court has required only that a court's exercise of its inherent powers "be a reasonable response to the problems and needs that provoke [their use]." *Degen* v. *United States*, 517 U.S. 820, 823-824 (1996). Dietz also contends that the jurors ceased being jurors when they were declared discharged, but his only explanation for why—that the court no longer had authority over them—merely begs the question.

In any event, even if the District Court erred in dismissing and then recalling the jury, the error was harmless. Everyone agrees that if the court had excused the jurors after calling a recess, it could have

called the jurors back, re-instructed them, and ordered them to re-deliberate. The fact that the court instead declared the jurors discharged did not prejudice Dietz in any way. That is because, as the District Court found and the Court of Appeals affirmed, the jurors were not exposed to any outside influences during the brief time they were dismissed. Thus, even if there were a defect in the proceedings, it did not affect Dietz's substantial rights.

III. Finally, Dietz contends that even if the District Court had authority to recall the jury, this Court should reverse—not based on anything in the Constitution or any federal statute or rule, but rather by fashioning a new rule under its supervisory powers.

This Court should decline this invitation. For one thing, both the Constitution and the Federal Rules require a showing of actual prejudice to justify reversal in this context, and this Court has no warrant to override that requirement. For another, Dietz's proposed rule would undermine interests in fairness, finality, and economy by encouraging parties who want a second bite at the apple to wait until after the jury is discharged to object to the verdict; by delaying the resolution of a case until after it is retried; and by requiring all involved—the court, the parties, the lawyers, the witnesses, and society—to endure a burdensome new trial.

The judgment of the Court of Appeals should be affirmed.

## ARGUMENT

### I. DIETZ'S NEW CLAIMS ARE NOT PROPERLY BEFORE THIS COURT

Dietz makes two claims in his merits brief. First, he claims that "a federal court lacks the authority to recall discharged jurors for further service in a case." Dietz Br. 13 (boldface and capitalization removed). Second, he claims that even if "there is a valid basis for a federal court's exercise of authority to recall discharged jurors," this Court should exercise its supervisory powers to establish, "as a matter of 'sound judicial practice,' that recall is not permitted in these circumstances." *Id.* at 33.

If these two claims sound unfamiliar to the Court, that is because they are. Dietz never made either of them before. Not in the District Court. Not in the Court of Appeals. And not in his petition for certiorari, when his counsel changed. With no acknowledgment that these claims are new, Dietz raises them for the first time in his merits brief. Because these new claims have been forfeited and are not properly before this Court, the writ should be dismissed as improvidently granted.

#### A. Dietz's New Claims Were Not Pressed Or Passed Upon Below

When an "argument" is "not raise[d]" or "address[ed]" below, it is "forfeited." *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012); *see also OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015). The reason for this rule is straightforward. Parties are "responsible for advancing the facts and arguments entitling them to relief." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008) (internal quotation marks omitted). And when they fail to do

so, this Court is deprived of "the benefit of thorough lower court opinions to guide [its] analysis." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012).

1. In the courts below, Dietz had every opportunity to make the claims that now appear in his merits brief; he simply failed to do so.

In the District Court, when Dietz eventually got around to objecting (after the jury had been dismissed), he did not cite the Federal Rules, or dispute the court's inherent power. Instead, he argued that recalling the jury violated his right to a "fair and impartial verdict." Pet. App. 26a; *see also id.* at 35a (arguing that the "discharge of the jury" had an "effect" on "sequestration" that "can't be cured"). That claim is altogether different from the ones he raises now. Just as a claim that Congress exceeded its enumerated powers is entirely distinct from a claim that it violated the Bill of Rights, so too a claim that a federal court lacked the authority to recall the jury is entirely distinct from a claim that it violated a party's right to a fair trial.

In the Court of Appeals, Dietz continued to insist that recalling the jury "impair[ed] [his] fundamental right to an unbiased jury trial." Dietz C.A. Opening Br. 21; *see also id.* at 23 (claiming a "deprivation of the right to a jury trial" (internal quotation marks omitted)); *id.* at 24 (arguing that the District Court violated "the notion of a free and unbiased jury"). According to Dietz, the District Court "violated [his] right to due process of law by denying him an impartial jury." Dietz C.A. Reply Br. 9; *see also id.* at 7 ("[T]he district court acted in a manner inconsistent with due process of law."). Dietz did make a few scattered, passing references to the "authority" of the

District Court and the "federal rules of procedure." Dietz C.A. Opening Br. 12-14; *see also* Dietz C.A. Reply Br. 11. But nowhere did Dietz discuss any sources of judicial authority, invoke the Court of Appeals' supervisory powers, or cite any particular federal rule—let alone argue that any rule had been violated. *See Halicki Films, LLC* v. *Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229 (9th Cir. 2008) ("passing references" in a brief are "insufficient to preserve" a claim).

2. Given Dietz's litigation choices, it is no surprise that neither court below addressed the claims that now appear in his merits brief. When Dietz argued that the recall deprived him of a "fair and impartial verdict," Pet. App. 26a, the District Court rejected that claim, concluding: "I'm satisfied we have had a fair and impartial jury." *Id.* at 39a; *see also id.* at 29a, 37a. The court said nothing about its authority under the Federal Rules or any other source.

The Court of Appeals likewise decided only whether recalling the jurors "compromise[d] their ability to fairly reconsider the verdict." *Id.* at 12a; *see also id.* at 1a (same); *id.* at 15a (discussing "the right to an impartial, untainted jury"). If there is any doubt on this score, one need only look at what Dietz himself says. His merits brief expressly criticizes the court for not "considering the question in terms of whether a federal court has the authority to recall discharged jurors." Dietz Br. 33. Thus, even Dietz concedes that the court did not "consider[]" the central issue in his merits brief. *Id.*, *see also id.* at 11 ("The court of appeals ignored the absence of authority to recall discharged jurors * * * "). The irony, of course, is that Dietz has only himself to

blame: The reason why the court never considered that claim is because he never raised it.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Dietz did not raise his claims below, and the lower courts did not address them. Because Dietz forfeited those claims, the writ should be dismissed as improvidently granted.

### B. Dietz's New Claims Were Not Included In His Petition For Certiorari

The writ should be dismissed for an additional reason: Even Dietz's petition for certiorari did not include any of the claims his merits brief now raises.

Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) similarly admonishes that a petitioner's brief "may not raise additional questions or change the substance of the questions already presented in [the petition]." Together, these rules "help to maintain the integrity of the process of certiorari. The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before [the Court] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted).

The Court granted certiorari on a single question: "Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case." Pet. for Cert. I. "Put another way," Dietz explained in his petition, "the question presented by this case is what level of

protection is necessary to preserve" the "fundamental guaranty of a fair trial, as embodied in the *constitutional* right to a jury trial as well as the broader right to due process." *Id.* at 16 (emphasis added) (internal quotation marks omitted).

Throughout the certiorari stage, Dietz characterized the question presented as one of federal constitutional law. When Bouldin insisted that there was actually no "[c]onstitutional issue" in the case, Br. in Opp. 18, Dietz reiterated that "the fundamental *constitutional* guarantee of a fair trial" was at stake. Reply to Br. in Opp. 9 (emphasis added); *see also id.* (arguing that "a fair trial in a fair tribunal is a basic requirement of due process protected by the Fourteenth Amendment" (internal quotation marks omitted)). According to Dietz's petition, the question presented had divided not only the federal courts of appeals, but also dozens of state courts of last resort, in civil as well as criminal cases—which could be true only if the question were indeed a *federal constitutional* one. Pet. for Cert. 8, 14-15, 16-17; *see also* Reply to Br. in Opp. 9. Completely absent from Dietz's certiorari-stage filings was any citation of a federal rule of procedure, discussion of a court's inherent authority, or invocation of this Court's supervisory powers.

Imagine Bouldin's surprise, then, when Dietz filed his merits brief, arguing that "considering the question in terms of * * * 'strik[ing] a sensible balance between considerations of fairness and economy'" constituted "the wrong mode of analysis." Dietz Br. 33 (quoting Pet. App. 11a). Dietz now urges this Court to "h[o]ld that a federal court lacks the authority to recall discharged jurors, and stop[] there"—without reaching "considerations of fairness." *Id.* So

much for deciding "what level of protection is necessary to preserve" the "fundamental guaranty of a fair trial." Dietz's merits brief asks this Court to decide an entirely different question—not about a constitutional right, but about judicial authority; and not affecting federal *and* state courts, but affecting federal courts *only*.[3]

This Court should not countenance this bait-and-switch. Because Dietz has blatantly "change[d] the substance" of the question presented, S. Ct. R. 24.1(a), the writ of certiorari should be dismissed as improvidently granted. *See City of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015); *Taylor*, 503 U.S. at 645-646.

* * *

If Dietz had wanted this Court to address issues involving the Federal Rules and inherent powers, he should have done what petitioners do all the time: litigate the issues below, obtain a lower-court judgment addressing them, and include the issues in a petition for certiorari. *See* Pet. for Cert. i, 5-6, *Carlisle* v. *United States*, 517 U.S. 416 (1996) (No. 94-9247) (presenting issues involving Federal Rules and inherent authority, after they had been addressed below). But Dietz did none of that. His new claims should not be considered.

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[3]There is no split on whether the Federal Rules of Procedure prohibit recalling a jury. The only federal court of appeals to have reversed a jury recall did not even address that issue. *See Wagner* v. *Jones*, 758 F.3d 1030 (8th Cir. 2014). Had Dietz relied on the Federal Rules in his petition, the lack of any conflict would have been evident at the certiorari stage.

## II. THE DISTRICT COURT HAD AUTHORITY TO RECALL THE JURORS

Were this Court to reach Dietz's claim that a federal court lacks authority to recall a jury, it should affirm the judgment of the Court of Appeals.

In this case, the District Court pronounced the jury discharged, and then undid that pronouncement, recalling the jury. Pet. App. 25a-26a. The District Court had the inherent authority to undo its pronouncement of discharge, and even if it did not, any defect in the proceedings was harmless.

### A. A District Court Has The Inherent Authority To Undo A Pronouncement Of Discharge To Correct A Verdict And Avoid A Costly New Trial

1. Federal courts must follow the procedures mandated by the Federal Constitution, statutes, and rules. *See Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). But those laws do not spell out every possible action that a federal court may take. Where those laws are silent, federal courts retain inherent powers to manage the proceedings before them. *See* Fed. R. Civ. P 83(b); *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985); *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (Harlan, J., in chambers). Those powers are incidental to the "judicial Power" itself. U.S. Const. art. III, § 1. They are powers that "necessarily result to our courts of justice from the nature of their institution." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

When a federal court exercises its inherent power, it acts on "its own authority." *Degen*, 517 U.S. at 823. Its actions are the product of its own judgment,

not the judgment of democratic bodies. *See id.* For that reason, a court's inherent power "must be exercised with restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980). And to ensure that it is, this Court "require[s] its use to be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823-824; *see also Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 244 (1993); *Joseph* v. *United States*, 135 S. Ct. 705, 705 (2014) (Kagan, J., respecting the denial of certiorari) ("That is not a high bar, but it is an important one.").

2. "Prior cases have outlined the scope of the inherent power of the federal courts." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991). From those cases emerge three settled principles.

*First*, a federal court has the inherent authority to "'correct that which has been wrongfully done by virtue of its process.'" *United States* v. *Morgan*, 307 U.S. 183, 197 (1939) (quoting *Arkadelphia Milling Co.* v. *St. Louis Sw. Ry.*, 249 U.S. 134, 146 (1919)); *see also Arizona* v. *Manypenny*, 672 F.2d 761, 765 (9th Cir. 1982) (Kennedy, J.) (explaining that the exercise of inherent power "to correct the legal process or avert its misfunction has been approved in varied circumstances"); *Cogan* v. *Ebden*, 1 Burr. 383, 384-385 (1757) (permitting the correction of a mistake in the verdict identified by juror affidavits). When, for instance, a judgment has been procured by fraud, a federal court has the inherent power to vacate that judgment. *See Chambers*, 501 U.S. at 44; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944). And when payment has been made on a judgment that is later overturned, a federal court has the inherent power to order restitution. *Nw. Fuel Co.* v *Brock*, 139 U.S. 216, 219

(1891). The lesson of these cases is clear: When the judicial process results in error, a federal court has the inherent authority to fix it.

*Second*, there is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. Thus, a federal court has the inherent power to dismiss a suit *sua sponte* for failure to prosecute, so as to "prevent undue delays in the disposition of pending cases." *Link* v. *Wabash R.R.*, 370 U.S. 626, 629 (1962). It has the inherent power to assess attorney's fees against counsel, so as to punish counsel "who unreasonably extend court proceedings." *Roadway Express*, 447 U.S. at 757 And it has the inherent power to require the timely filing of objections to a magistrate judge's report, so as to promote "judicial economy" and prevent the "inefficient use of judicial resources." *Thomas*, 474 U.S. at 147-148. As these cases establish, federal courts have the inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

*Third*, a federal court has the inherent authority to modify, and even rescind, any order before final judgment. *See Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1, 47-48 (1943); *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88 (1922); *City of Los Angeles* v. *Santa Monica Baykeeper*, 254 F.3d 882, 885-887 (9th Cir. 2001). For instance, after declaring the evidence closed, a federal court has the inherent power to reopen the evidence and let the parties present additional proof. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). After submitting a case to the jury, a federal court

has the inherent power to repossess the case and let the jury hear more evidence. *See United States* v. *Crawford*, 533 F.3d 133, 137-138 (2d Cir. 2008) (adopting the Fourth Circuit's view that "a district court does have discretion to reopen a case even after the jury has begun deliberations"); *United States* v. *Nunez*, 432 F.3d 573, 579 (4th Cir. 2005); *cf. United States* v. *Bayer*, 331 U.S. 532, 537-539 (1947). And after issuing its mandate, a federal court of appeals has the inherent power to recall the mandate and enter a new judgment. *See Calderon* v. *Thompson*, 523 U.S. 538, 549 (1998). These cases stand for a simple proposition: What a court can do, it has the inherent power to undo. *Cf. Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (2015) ("What we can decide, we can undecide.").

3. Together, these principles establish that after a jury returns an invalid verdict and the district court pronounces the jury discharged, the court may recall the jury as a "reasonable response to the problems and needs" confronting the court. *Degen*, 517 U.S. at 823-824.

Take the facts of this case. The District Court did not recall the jury for just any reason; it did not, for instance, recall the jury merely because it disagreed with the jury's verdict, or because it thought the jury's deliberations too brief. Rather, the "problem * * * that provoke[d]" the recall was a verdict that was invalid as a matter of law. *Id.* at 824; *see* Pet. App. 26a (court explaining that its "reason" for recalling the jury was that "the verdict at zero dollars" was not "legally possible in view of stipulated damages exceeding $10,000"). The judicial process had produced a legally impermissible result. And by recalling the jury, the court sought to "correct that

which ha[d] been wrongfully done"—a textbook exercise of its inherent power. *Morgan*, 307 U.S. at 197

Recalling the jury, moreover, met an essential "need[]," *Degen*, 517 U.S. at 824—the need for the court to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. Everyone agreed that the $0 verdict could not stand. Dietz's counsel, however, did not raise any objection until after the jury had been pronounced discharged. Absent a recall, then, the court would have had "no choice but to grant a new trial." Pet. App. 31a. And that would have imposed significant costs on all involved—the judge who must make room on his docket, the citizens who must serve as new jurors, the lawyers who must try the case a second time, and the witnesses who must appear to testify yet again. *See McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) ("Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials.").[4] By contrast, recalling the jury preserved "all the work" that had already gone into the trial, Pet. App. 29a, and allowed the case to proceed to a speedy and efficient resolution. *Id.* at 38a-39a. Recalling a jury thus falls squarely within a court's inherent authority to manage the proceedings "so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

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[4]Although the costs borne by witnesses in this trial may not have been exorbitant, in many other trials they very well could be. *See United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

Finally, recalling the jury was a "reasonable response"—a response "limited by," and tailored to, the "necessit[ies]" of correcting the verdict and avoiding the cost of a new trial. *Degen*, 517 U.S. at 824, 829. The court did not impose any new obligations on the parties or their counsel, or deprive them of any rights. *Cf., e.g., Roadway Express*, 447 U.S. at 765 (upholding inherent power to impose sanctions); *Link*, 370 U.S. at 630-631 (upholding inherent power to dismiss suit). Instead, the court merely undid what it had done, rescinding its pronouncement, made only moments before, that the jury was discharged. The power to undo is inherent in every court. And in exercising it here, the court simply returned the parties to the status quo ante, prior to its pronouncement of discharge. *See Nw. Fuel*, 139 U.S. at 219 (upholding inherent power to "restore, as far as possible, the parties to their former position"). By (un)doing no more than was necessary, the court responded "reasonabl[y]" "to the problems and needs that provoke[d] it." *Degen*, 517 U.S. at 823-824.

In short, a district court has the inherent authority to undo a pronouncement of discharge to correct a verdict and avoid a costly new trial.

4. Indeed, federal courts have exercised this authority since at least 1885—a tradition that long predates the Federal Rules of Procedure. *See Burlingame* v. *Cent. R. of Minn.*, 23 F 706, 706-707 (C.C.E.D.N.Y. 1885). Quoting from a treatise first published in 1889, the Fourth Circuit held nearly a century ago that "the mere announcement of [the jurors'] discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir. 1926) (quoting Austin Abbott, *A*

*Brief for the Trial of Criminal Cases* 730 (2d ed. 1902)); *see also* Austin Abbott, *A Brief for the Trial of Criminal Cases* 513 (1st ed. 1889) (same); 5 Ronald A. Anderson, *Wharton's Criminal Law and Procedure* § 2149, at 341 (1957) (same); *United States* v. *Lowery*, 64 F. App'x 879, 882 (4th Cir. 2003) (per curiam) (upholding jury recall).

Since *Summers*, five other circuits have held that a district court may recall a jury after the court has declared the jury discharged. *See* Pet. App. 13a; *Ira Green, Inc.* v. *Military Sales & Serv. Co.*, 775 F.3d 12, 24-26 (1st Cir. 2014); *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *United States* v. *Rojas*, 617 F.3d 669, 677-678 (2d Cir. 2010); *United States* v. *Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994). Even the Eighth Circuit's decision in *Wagner* v. *Jones*, 758 F.3d 1030 (8th Cir. 2014)—which ultimately reversed a recall because of concerns about juror prejudice—did not question the district court's inherent authority to undo a pronouncement of discharge. *See id.* at 1035 (implying that undoing a pronouncement of discharge would be permissible if the jurors were still in the courtroom).

Though the practice in federal courts is most relevant here, state courts have similarly upheld the authority of trial courts to recall a jury after the jury has been dismissed. *See Brister* v. *State*, 26 Ala. 107, 132 (1855); *Levells* v. *State*, 32 Ark. 585, 591 (1877); *Masters* v. *State*, 34 So. 2d 616, 620-621 (Fla. Dist. Ct. App. 1977); *Mitchell* v. *State*, 22 Ga. 211, 235 (1857); *Young* v. *State*, 136 S.E. 459, 459-460 (Ga. Ct. App. 1927); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw. 2014); *People* v. *McNeeley*, 575 N.E.2d 926, 928-929 (Ill. App. Ct. 1991); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675

(Ky. 1898); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S & R, Inc.*, 639 A.2d 660, 665 (Md. 1994); *Lapham* v. *E. Mass. St. Ry.*, 179 N.E.2d 589, 591 (Mass. 1962); *Anderson* v. *State*, 95 So. 2d 465, 467-468 (Miss. 1957); *Vancil* v. *Carpenter*, 935 S.W.2d 42, 46-48 (Mo. Ct. App. 1996); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam); *Drop Anchor Realty Tr.* v. *Hartford Fire Ins. Co.*, 496 A.2d 339, 345 (N.H. 1985); *Dearborn* v. *Newhall*, 63 N.H. 301, 302-303 (1885); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006); *Rippley* v. *Frazer*, 149 A.D. 399, 403 (N.Y. App. Div. 1912); *Cole* v. *Laws*, 10 S.E. 172, 174 (N.C. 1889); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Gardner* v. *Commonwealth*, 350 S.E.2d 229, 232-233 (Va. Ct. App. 1986); *State* v. *Roberge*, 582 A.2d 142, 144-145 (Vt. 1990).

5. None of this is to say that a court *must* exercise its authority to recall a jury. The law leaves the decision whether to recall the jury, or to instead hold a new trial, to the court's discretion, to be made on a case-by-case basis.

At the same time, that discretion is not unlimited. As noted, a federal court cannot exercise its authority in violation of the Federal Constitution. And it would violate the D· Process Clause, for example, to recall jurors who .. 1 lost their impartiality after being told they were discharged, or whose memories of the evidence had faded because of the passage of time. *See, e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 385 (2010); *infra* pp. 45, 52. In his merits brief, however, Dietz does not argue that the District Court violated the Constitution in any way. The District

Court had the authority to recall the jury, and it did not abuse its discretion in doing so.

### B. The Federal Rules Do Not Divest A Court Of Its Inherent Authority To Undo A Pronouncement Of Discharge

In arguing to the contrary, Dietz first relies on the Federal Rules of Procedure. According to Dietz, "[n]othing in the federal rules * * * *gives* a district court the authority to recall jurors after discharge for further service in a case." Dietz Br. 14 (emphasis added). But that is irrelevant. Because a federal court has the *inherent* authority to recall the jurors, it need not point to any *express* authority in the Federal Rules. Thus, the question is not whether the rules *authorize* a court to recall the jurors. Because a court inherently has the authority to do so, the question is whether the rules *divest* a court of that authority. *See Chambers*, 501 U.S. at 46 (asking whether the federal rules "displace[d]" a court's inherent power to sanction bad-faith conduct); *United States* v. *Nobles*, 422 U.S. 225, 234 (1975) (asking whether a federal rule "deprived" a court of its inherent power to order disclosure of evidence).

They do not. The federal rules say nothing about whether a federal court may undo a pronouncement of discharge by recalling the jurors. The rules are simply silent on the subject—just as they are silent on whether a court may reopen the evidence after it has been closed, repossess the case after it has been submitted to the jury, or recall the mandate after it has been issued on appeal. *See* Fed. R. Civ. P 50(a)(2), 50(b), 51(a); Fed. R. App. P 41; *supra* pp. 19-20. Accordingly, the rules leave undisturbed a court's inherent authority to recall the jury—just as

they leave undisturbed all of those other inherent powers of a court. *See* Fed. R. Civ. P 83(b) (allowing a court to "regulate practice in any manner consistent with" federal and local rules); *Link*, 370 U.S. at 633 n.8 (citing Rule 83 for the proposition that a court may act even in the absence of a rule governing the situation); *Nobles*, 422 U.S. at 234-236 (holding that a federal rule that was silent on "trial practice" should not be read as displacing a court's powers "once trial has begun").

Dietz does not dispute the lack of any express prohibition on recalling the jury in the rules. Instead, he contends that the rules "necessarily *imply*" such a prohibition. Dietz Br. 14 (emphasis added). Dietz relies primarily on Civil Rules 48(c) and 51(b)(3), which govern the polling and instructing of the jury. *Id.* at 14-15, 17 Rule 48(c) provides that "[a]fter a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." Rule 51(b)(3) provides that "[t]he court * * * may instruct the jury at any time before the jury is discharged."[5]

No court—not one—has ever adopted Dietz's reading of the rules. For good reason: Although Rules 48(c) and 51(b)(3) say what a court may do *before* a discharge, they say nothing about a court's power to *undo* a discharge. *See Fernandez*, 81 S. Ct. at 644 & n.7 (Harlan, J., in chambers) (recognizing that a federal rule providing that a defendant "shall be *admitted* to bail" did not withdraw a district court's

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[5]Because citations to these rules did not appear in this case until Dietz's merits brief, we have reproduced the text of the rules in an addendum to this brief.

inherent authority to *revoke* bail (emphasis added)). Indeed, even assuming that those rules could be read as prohibiting a court from polling or instructing the jury *after* discharge, they would not stand in the way of what the District Court did here. That is because, by undoing the pronouncement of discharge, the court returned the case to the status quo ante, *before* the discharge had been announced. At that point, any polling or instructing of the jury was (once again) authorized by Rules 48(c) and 51(b)(3).

To read those rules as prohibiting recall would be particularly inappropriate in light of their affirmative language. Rules 48(c) and 51(b)(3) are phrased in terms of what a court "may" (or, in the case of a party's request for a poll, "must") do. The language of each rule affirmatively "authorizes" a court to do something. *Link*, 370 U.S. at 630. When confronted with similar language in *Link*—*i.e.*, "a defendant *may* move for dismissal of an action"—the Court declined to construe the rule as abrogating the inherent power of a court to dismiss an action on its own. *Id.* (emphasis added). The Court should decline to make the same leap here. It would make little sense to construe Rules 48(c) and 51(b)(3) as *restricting* a court's inherent authority to do one thing (*i.e.*, undo a pronouncement of discharge), just because they *grant* a court the authority to do something else (*i.e.*, poll and instruct the jury).

Indeed, the Federal Rules themselves warn against construing Rules 48(c) and 51(b)(3) in such a restrictive way. Civil Rule 1 provides that the rules "should be construed" to "secure the just, speedy, and inexpensive determination of every action and proceeding." Thus, any ambiguity in the rules should be construed in favor of preserving a court's inherent

power to undo a pronouncement of discharge and thereby allow a verdict to be corrected without the delay and expense of a new trial. Civil Rule 83(b), moreover, provides that "[a] judge may regulate practice in *any manner* consistent with" federal and local rules. (Emphasis added.) Rule 83(b) underscores that where, as here, the rules do not specifically prohibit a practice, a court may retain the inherent power to engage in it.

Dietz's reading of Rules 48(c) and 51(b)(3) also runs counter to the history of those rules. Those subsections were added in 2009 and 2003, respectively, against the background of a uniform body of federal court of appeals precedent permitting jury recalls. *See supra* pp. 22-23; *Carlisle*, 517 U.S. at 426 (reviewing cases "prior to the enactment" of the federal rule at issue). There is no indication whatsoever that those rules were intended to abrogate that long line of decisions. *See* Fed. R. Civ. P. 51 advisory committee's note to 2003 amendment (explaining that subsection (b)(3) was meant to "reflect[] common practice"). It should "require a much clearer expression of purpose than [the Rules] provide[] for [the Court] to assume that [they were] intended to" repudiate the outcomes in all of those cases. *Link*, 370 U.S. at 631-632; *see also Chambers*, 501 U.S. at 47 ("[W]e do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." (internal quotation marks omitted)). For all of these reasons, Rules 48(c) and 51(b)(3) do not displace a court's inherent authority to undo the pronouncement of a discharge.

Dietz's remaining rule-based arguments require little response. He contends that Civil Rules 50(b)

and 59 do not authorize a court to recall jurors. Dietz Br. 15-16. But there is no reason they would. Rules 50(b) and 59 govern motions for post-trial relief in the form of judgment as a matter of law and a new trial. Recalling a jury is altogether different from those two forms of relief, so no negative implication should be drawn from the fact that those rules do not mention recalling a jury.

Dietz also points to various Federal Rules of Criminal Procedure. Dietz Br. 16-18. But "this is a civil case," so those rules do not apply. *Id.* at 15 n.2. In any event, they are also silent on whether a court may undo a discharge, and for the reasons above, do not implicitly displace a court's inherent authority to do so. *See* Fed. R. Crim. P 2, 57(b).

Finally, this case is far different from *Carlisle*. The question in *Carlisle* was whether a district court could grant a motion for judgment of acquittal filed one day beyond the time limit prescribed by Criminal Rule 29(c). 517 U.S. at 417-418. The Court answered no, because the rules were "plain and unambiguous": Criminal Rule 29(c) required that a motion be made within 7 days "after the jury is discharged," and Criminal Rule 45(b) provided that "the court may not extend the time limit for taking any action under Rul[e] 29." *Id.* at 420-421. Here, by contrast, there is no equivalent "may not" prohibition; rather, the rules are silent on whether a court may undo a pronouncement of discharge. And by undoing such a pronouncement, the court brings itself back within the "specified time period," Dietz Br. 24, for instructing and polling the jury under the Civil Rules. *See supra* p. 27.

Dietz contends, however, that if a court could undo a discharge, it would lead to a "[b]izarre[]" result: A court could reset the clock for filing a motion for acquittal under Rule 29(c) "through the simple artifice of recalling jurors and then once again discharging them." Dietz Br. 18. But there is no reason for concern. If recalling the jurors is just an artifice, it would not be a "reasonable" exercise of inherent authority under this Court's precedent. *Degen*, 517 U.S. at 823-824. In any event, Rules 29(c) and 45(b) have since been amended to allow courts to "render timely an otherwise untimely motion," Dietz Br. 18, simply by granting a request to file out of time. *See* Fed. R. Crim. P. 29 advisory committee's note to 2005 amendment; *id.* R. 45 advisory committee's note to 2005 amendment. The notion that a court would resort to recalling a jury merely to reset the clock is simply absurd.

### C. Dietz's Remaining Counterarguments Lack Merit

Dietz makes other arguments against the District Court's authority in this case. Those arguments, too, lack merit.

#### *1. Dietz's historical claim fails*

Dietz contends that there is insufficient "historical support" for what the District Court did in this case. Dietz Br. 31. According to Dietz, no inherent power exists unless "the exercise of that power has a 'long unquestioned' history " *Id.* at 23 (quoting *Carlisle*, 517 U.S. at 426). In his view, that "requirement[]" was not satisfied here. *Id.*

a. Dietz's argument fails for a simple reason: This Court has never imposed such a "requirement[]." In the two cases on which Dietz relies—*Link* and *Car-*

*lisle*—the Court considered whether a claimed power had "long gone unquestioned" for only a narrow purpose: construing a federal rule of procedure. *Link*, 370 U.S. at 631-632; *see also Carlisle*, 517 U.S. at 426. When a claimed power has "long gone unquestioned," *Link*, 370 U.S. at 631, the Court will "not assume, in the absence of a clear expression," that the federal rule was intended to abrogate that power. *Carlisle*, 517 U.S. at 426; *see also supra* p. 28.

There is no basis for transforming this "cautionary principle" for construing a federal rule into a requirement for recognizing an inherent power. *Carlisle*, 517 U.S. at 426. This Court has recognized inherent powers in the past without considering whether they had long gone unquestioned. *See, e.g.*, *Thomas*, 474 U.S. at 146-148; *Roadway Express*, 447 U.S. at 764-767.

b. In any event, Dietz's historical argument fails on its own terms. As explained above, a federal court's authority to recall a jury following a pronouncement of discharge has long gone unquestioned. *See supra* pp. 22-23. Even among the States, there is a long history, dating to at least 1855, of courts recalling a jury after the jury has been dismissed. *See supra* pp. 23-24.

With only two exceptions, all of the cases Dietz's cites are inapt.[6] To begin, many of the decisions he cites actually *upheld* a court's order recalling a jury.

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[6]The two exceptions are *West* v. *State*, 92 N.E.2d 852 (Ind. 1950), and *Yonker* v. *Grimm*, 133 S.E. 695 (W. Va. 1926). Contrary to the vast weight of authority, those decisions appear to hold that a court lacks the authority to recall a jury once the court has pronounced the jury discharged.

*See Summers*, 11 F.2d at 586; *Brister*, 26 Ala. at 132; *Lahaina Fashions*, 319 P.3d at 367-368; *Fornea*, 140 So. 2d at 383; *Nails*, 639 A.2d at 665; *Myers*, 459 S.E.2d at 305; *Webber*, 652 S.W.2d at 782. Dietz falsely describes six of these cases as "hav[ing] *rejected* a rule permitting jury recall," Dietz Br. 30 (emphasis added), but they do just the opposite. Dietz's representations are simply wrong.

Like the decision below, most of the remaining decisions Dietz cites do not rest on "whether a * * * court has the authority to recall discharged jurors." Dietz Br. 33. Some lack any reasoning, so it is unclear what ground they rest on. *See Loveday's Case*, 77 Eng. Rep. 573 (1608); *Mills* v. *Commonwealth*, 34 Va. 751, 752 (1836). Others contain only dicta about recalling juries. *See Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 805 (Mont. 2006); *Harrell* v. *State*, 278 P 404, 406 (Okla. 1929). And still others rest on something other than a court's lack of authority—namely, concerns about juror impartiality. *See Ex parte T.D.M.*, 117 So. 3d 933, 940 (Ala. 2011) (per curiam) (purpose of rule is to prevent "appearance of impropriety"); *Spears* v. *Mills*, 69 S.W.3d 407, 413 (Ark. 2002) (purpose of rule is to "avoid even the appearance of any possible taint to the jury's verdict"); *People* v. *Hendricks*, 737 P.2d 1350, 1358 (Cal. 1987) (purpose of rule is "to guarantee a fair trial, * * * shielded from outside influences"); *Montanez* v. *People*, 966 P.2d 1035, 1037 (Colo. 1998) (purpose of rule is to "ensure that jury verdicts will not be tainted by any outside influence"); *Sargent* v. *State*, 11 Ohio 472, 474 (1842) (purpose of rule is "to insure the impartial administration of justice and the purity of jurors"); *State* v. *Nash*, 294 S.W.3d 541, 553 (Tenn. 2009) (purpose of

rule is to ensure that "jurors remain shielded from outside influences"); *Melton* v. *Commonwealth*, 111 S.E. 291, 294 (Va. 1922) (purpose of rule is to protect the "sanctity of jury trials" from "the hazard of suspicion").

To be sure, some of the decisions Dietz cites suggest limits on when a jury can be recalled—for example, holding that a jury cannot be recalled once it has "left the presence and control of the trial court." *Nash*, 294 S.W.3d at 550. But those limits rest not on any purported lack of authority to undo a pronouncement of discharge, but rather on those courts' views of when undoing such a pronouncement would raise concerns about juror impartiality. *Id.* at 553. The limits expressed in those cases thus have no bearing on the District Court's authority here.

Nor do these decisions carry weight even with respect to concerns about juror impartiality. For one thing, this Court's cases make clear that the guarantee of juror impartiality is derived from the Federal Constitution, which demands only that a jury be free of actual prejudice. *See, e.g.*, *Skilling*, 561 U.S. at 385; *infra* p. 45. Most of the decisions Dietz cites do not even reference the Federal Constitution. *See, e.g.*, *Spears*, 69 S.W.3d at 413; *Hendricks*, 737 P.2d at 1358-1360; *Sargent*, 11 Ohio at 474; *Melton*, 111 S.E. at 294. Instead, the limits that those decisions impose appear to be derived from free-floating notions of a fair trial, which have no basis in this Court's precedent. When viewed against the constitutional standard of actual prejudice, those limits are simply arbitrary. For example, the fact that a jury left the court's "presence or control" would not necessarily mean that it *was* exposed to prejudicial influences; nor would the fact that the jury remained

within the court's "presence or control" guarantee that it was *not* so exposed. *See* Pet. App. 11a ("[T]here is nothing talismanic about the courtroom door.").

For another thing, many of these decisions—including *Loveday's Case*, *Mills* v. *Commonwealth*, and *Sargent*—come from a different era, when jury sequestration for the entirety of deliberations was the rule, rather than the exception. The practice of mandatory sequestration started seven centuries ago in England, and lasted there until 1870. *See United States* v. *Piancone*, 506 F.2d 748, 749 n.1 (3d Cir. 1974); 2 Edward Coke, *The First Part of the Institutes of the Laws of England* § 366, at 227b (16th ed. 1809) ("By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle * * * "). In the United States, the practice persisted well into the twentieth century. *See United States* v. *Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987) ("Historically courts would not allow a jury to return home for the night during deliberations, even with an admonition. This circuit approved such a jury release only in 1921, others much later." (citations omitted)); Marcy Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 71 n.30 (1996) ("In 1995, New York became the last state to eliminate mandatory sequestration during deliberations in all felony trials."). Preventing the jurors from separating was thought necessary to ensure that they were not exposed to outside influences. *See Sargent*, 11 Ohio at 473-474; *Snell* v. *Bangor Steam Navigation Co.*, 30 Me. 337, 339 (1849). And if the law did not tolerate the jurors' separating during deliberations, it certainly would not tolerate their

separating afterward and being called back. *See Sargent*, 11 Ohio at 473-474. As Dietz acknowledges, however, the days when jurors had to be "kept together in seclusion for the duration of deliberations" have long passed. Dietz Br. 28. Today, judicial tools like jury instructions and *voir dire* are considered adequate to guarantee an impartial jury. Respect for those very same tools renders the decisions Dietz cites anachronistic.

For these reasons, the limits on recall recognized by many of the decisions Dietz cites are irrelevant or outdated. This case would fall within all but the narrowest of those limits in any event. As the Court of Appeals determined, at the time the jury was recalled in this case, it "had not yet dispersed." Pet. App. 13a; *see also id.* at 15a. "Most" of the jurors were "just outside the [courtroom] door," while one had "gone to the first floor" "to get a hotel receipt." *Id.* at 31a. Dietz contends that that one juror "left the courthouse altogether." Dietz Br. 2. But that was not the District Court's understanding. *See* Pet. App. 26a, 28a, 31a. And Dietz cannot carry his burden of proving otherwise by relying on a single stray remark by the clerk of the court. *See id.* at 28a; *id.* at 14a n.8 (noting that the record is "inconsistent" on this point).

Moreover, the jury had not mingled with any bystanders. In fact, the record does not reveal the presence of any bystanders at all—no press, no family members, no visitors on other business. That is not surprising given the setting: a small courthouse in Butte, Montana. When the court asked the jurors whether they had "talked to anybody about the case outside [their] immediate numbers," the jurors responded that they had not. *Id.* at 31a. The

juror who had gone to the first floor confirmed the same, stating unequivocally: "I didn't talk to anybody." *Id.* The only person with whom any juror may have spoken was the clerk of the court. *Id.* at 26a-27a. And she was no "bystander." The clerk is an officer of the court, who is in frequent contact with the jury as part of her job. *See Myers*, 459 S.E.2d at 305 (holding that a jury, which was dismissed to the custody of the clerk and then recalled, had no opportunity to mingle with or discuss the case with others); *Rodriguez*, 134 P.3d at 740 ("[B]ecause they are officers of the court, we decline to presume that court officials have contaminated a juror or the jury * * * ").

Finally, the jurors "remained under the *de facto* control of the court." *Sierra Foods*, 816 P.2d at 467 The court staff had no trouble finding all of the jurors and asking them to return. *See Masters*, 344 So. 2d at 620 (explaining that "the fact that [the jurors] were so readily re-assembled indicates" that they had not "in fact separated"). Each juror was still within the "call of the Court." *Willoughby* v. *Threadgill*, 72 N.C. 438, 440 (1875). Thus, even when viewed in light of other courts' concerns about juror impartiality—which have nothing to do with a federal court's inherent authority, have no basis in the Federal Constitution, and have roots in a bygone era of mandatory sequestration—the judgment below should stand.

c. Dietz relies on "[o]ther rules and practices at common law," Dietz Br. 27, but they do not provide historical support for his claim either.

Dietz cites *Jackson* v. *Williamson*, 100 Eng. Rep. 153 (1788), *Little* v. *Larrabee*, 2 Me. 37 (1822), and

*Walters* v. *Junkins*, 16 Serg. & Rawle 414 (Pa. 1827), for the proposition that a jury typically is not permitted to amend a verdict following discharge. Dietz Br. 27-28. But in each of those cases, the jury's verdict was perfectly proper; it was not incomplete, inconsistent, or otherwise legally impermissible. The jurors claimed merely to have intended the verdict to be something different, and the courts concluded that permitting a verdict to be amended, just because the jurors later expressed disagreement with it, would lead to great abuse. *See Walters*, 16 Serg. & Rawle at 415; *Little*, 2 Me. at 39-40; *Jackson*, 100 Eng. Rep. at 153. Those decisions do not address the court's authority to recall the jury in cases like this one, where the verdict was invalid as a matter of law and would not have been allowed to stand in any event.

Dietz's reliance on *Rex* v. *Wooler*, 105 Eng. Rep. 1280 (1817), is also misplaced. In that case, it was unclear whether all of the jurors had assented to the verdict, so the court ordered a new trial. *Id.* at 1282. The only question at that point was "whether that new trial should be had by the old or by a new panel." *Id.* at 1283. And the court decided that it "ought not to direct a new trial before the same persons." *Id.* *Wooler* stands for the unremarkable proposition that "where a new trial is granted, * * * it should be by a fresh jury." *Id.* at 1284. The case does not address the antecedent question of when a court can recall a jury instead of granting a new trial.

The last couple of common-law rules Dietz identifies are equally irrelevant. He notes that in Blackstone's day, a civil case would be dismissed if the plaintiff failed to appear in court to receive the verdict. Dietz Br. 29. But in such a case, there would be no need to recall the jury, because the

plaintiff would have forfeited his right to a verdict anyway. Dietz also says that it was a crime for a juror to receive outside information about a case. *Id.* But no one thinks that jurors should be asked to re-deliberate if they were exposed to outside influences following dismissal.

### 2. *Dietz's claim that recalling the jury was not "necessary" fails*

Dietz next contends that recalling the jury in this case was not " 'necessary to the exercise' of a federal court's other powers" or "sufficiently 'limited by the necessity giving rise to its exercise.' " Dietz Br. 31. But as explained above, the District Court's decision to recall the jury was a reasonable response to the necessities of correcting a verdict and avoiding a costly new trial. *See supra* pp. 20-22.

Dietz nevertheless insists that the power to recall a jury is not "necessary" because, even without that power, a court would still be able to function as a court and enforce its decrees. Dietz Br. 31. But in this context, as in many others, the word "necessary" "imports no more than that one thing is convenient, or useful, or essential to another." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). This Court has never restricted a court's inherent powers to those which are *absolutely* necessary. On the contrary, this Court has recognized that inherent powers may be "necessary only in the sense of being useful." *Chambers*, 501 U.S. at 47 n.12. Accordingly, this Court has required only that the exercise of inherent powers "be a reasonable response to the problems and needs that provoke [their use]." *Degen*, 517 U.S. at 823-824.

Still, Dietz maintains that recalling the jury can never be necessary because a court could always remedy an invalid verdict by granting a new trial instead. Dietz Br. 31-32. Quoting from a dissent, he contends that "'a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end.'" *Id.* at 32 (quoting *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting)). But that is not the law. As the Court's opinion explained, "the inherent power of a court can be invoked even if procedural rules exist which [address the same problem]." *Chambers*, 501 U.S. at 49; *see also id.* at 50 ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules."). In any event, a new trial is no "substitute[] for the inherent power." *Id.* at 46. The reason is simple: Although both would remedy the verdict, a new trial would impose significant costs on the parties, the lawyers, the witnesses, the court, and society—while recalling the jury would not.

Dietz asserts that he is "unaware of any case in which this Court has held that considerations of expediency are sufficient to give rise to inherent authority." Dietz Br. 32. But no one suggests that expediency alone can suffice. Recalling the jury in this case was not only expedient, but also just (because it allowed for the correction of a wrongful verdict) and narrowly tailored (because it merely restored the status quo ante). *See supra* pp. 20-22. And though Dietz is unable to name any, many of this Court's inherent-power cases regard expediency, efficiency, and economy as key considerations. *See, e.g.*, *Degen*, 517 U.S. at 824 (inherent authority to

dismiss appeal while the party seeking relief is a fugitive "promotes the efficient, dignified operation of the courts" (internal quotation marks omitted)); *Thomas*, 474 U.S. at 147-148 (inherent authority to require the filing of objections is "supported by sound considerations of judicial economy" and prevents "inefficient use of judicial resources"); *Roadway Express*, 447 U.S. at 757 (inherent authority to sanction counsel deters counsel from "unreasonably extend[ing] court proceedings"); *Link*, 370 U.S. at 630-631 (inherent authority to dismiss *sua sponte* a suit for lack of prosecution promotes "the orderly and expeditious disposition of cases"); *Landis*, 299 U.S. at 254 (inherent authority to stay proceedings promotes "economy of time and effort").

### 3. *Dietz's claim that the jurors ceased being jurors merely begs the question*

Dietz offers a final reason why a court does not have authority to recall the jury: "Upon discharge, a juror ceases to be a juror." Dietz Br. 18. And why does "a juror cease[] to be a juror"? "[B]ecause," he says, "after discharge, the court no longer has authority over the jury." *Id.* at 22.

If this argument sounds circular, it is because it is. According to Dietz, the court lacks authority over the jurors because they have ceased to be jurors; and they have ceased to be jurors because the court lacks authority over them. Both the premise and the conclusion to Dietz's argument are the same. And so we end up exactly where we started: When does a court lack authority over the jurors?

*Porret* v. *City of New York*, 169 N.E. 280 (N.Y. 1929), does not help Dietz answer that question. *Porret* did not even involve a jury recall. Rather, the

jury in that case had separated for the night after delivering a sealed verdict. *Id.* at 280. When the jury reassembled the next morning, the trial judge refused to accept the verdict and sent the jury back to return a new one. *Id.* The New York Court of Appeals held that the trial judge did not err in doing so. *Id.* It contrasted the case before it with one where the jury "has been discharged altogether and relieved, by the instructions of the judge, of any duty to return." *Id.* "In such circumstances," the court opined, the jury "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals." *Id.* But the case before it was different, the court explained, because "[t]he record does not fairly justify the inference that this jury had reassembled in any such desultory way." *Id.*

These passages are mere dicta, unaccompanied by any citation or source of law. They address the discretion of a New York state trial judge—not a federal district court. And they do not even describe the facts of this case. The jurors here did not "reassemble[] in any such desultory way"; they did not just "happen to come together again," as an unorganized group. *Id.* Instead, they were asked to come back by the court, for a particular reason: to correct their legally impermissible verdict. *Porret* says nothing about the authority of a federal court to recall a jury to do that. *Cf. Rippley*, 149 A.D. at 403 (upholding a jury recall under New York law).

Dietz hypothesizes a scenario in which a juror refuses to return after being told to come back. But there are countless points in a trial at which a juror could refuse to return; the moments following dismissal are not unique. Jurors, after all, are no longer sequestered throughout trial or even during

deliberations. *See supra* pp. 34-35. Instead, they are allowed to go their separate ways during recesses, during lunch, and at the end of the day; the jurors in this case took seven breaks that were noted on the record. J.A. 16, 18, 20, 24, 26, 29, 30. Following any such break, a juror could refuse to return, or could return but refuse to participate or deliberate. Should that happen, there is typically good cause to excuse the juror from service. *See* Fed. R. Civ. P 47(c) (authorizing a court to "excuse a juror for good cause" during trial or deliberations); Fed. R. Crim. P. 23(b)(3) (similar). That would typically be true in Dietz's hypothetical as well. Dealing with these sorts of problems is usually left to a district court's sound discretion. *See, e.g.*, *United States* v. *Baker*, 262 F.3d 124, 129 (2d Cir. 2001). And there is no reason not to entrust district courts with the same discretion here.

Because the District Court had the inherent authority to recall the jury, the judgment below should be affirmed.

### D. In Any Event, Any Defect In The Proceedings Was Harmless

Even if the District Court erred in dismissing and then recalling the jury in this case, the error was harmless.

Civil Rule 61 provides that "[u]nless justice requires otherwise, no * * * error by the court or a party * * * is ground for granting a new trial * * * At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P 61; *see also* Fed. R. Crim. P 52(a) (similar). This rule is "as binding as any statute," and this Court may not

invoke its supervisory powers to "circumvent" it. *Bank of Nova Scotia*, 487 U.S. at 254-255.

To appreciate the nature of the asserted error here, consider what all agree would have been an error-free proceeding. After the jury returns a $0 verdict, the court orders a recess and dismisses the jury. The court concludes that the verdict is legally impermissible and then calls the jurors back, re-instructs them, and orders them to re-deliberate. Everyone agrees that there would have been no error if the court had followed this procedure. *See* Dietz Br. 14-15, 40. Re-instructing the jurors and ordering them to re-deliberate were "action[s] which could have been taken, if properly pursued." *Nguyen* v. *United States*, 539 U.S. 69, 79 (2003).

The procedure followed in this case differed from the procedure above in only one respect: Instead of calling a recess, the court declared the jurors discharged. As a consequence, the jurors were no longer under the court's instructions not to discuss the case with others. The question, then, is whether this supposed defect affected Dietz's substantial rights.

The answer is no. The only way in which discharging the jury instead of calling a recess could have prejudiced Dietz is if the jurors were exposed to outside influences during the brief period following their dismissal. After questioning the jurors, the District Court found that they had not been "contaminated by any outside information." Pet. App. 31a. The Court of Appeals affirmed that finding, *id.* at 15a, and Dietz has never disputed it. *See Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."). Because the

jurors remained impartial, the fact that they were pronounced discharged did not affect the outcome of the case. Indeed, courts have deemed similar errors in recalling discharged jurors harmless when, as here, there was no evidence of bias. *See Rojas*, 617 F.3d at 678 & n.5; *United States* v. *Davis*, 15 F.3d 1393, 1404 & n.3, 1409-1410 (7th Cir. 1994); *United States* v. *Huntress*, 956 F.3d 1309, 1316-1317 (5th Cir. 1992); *United States* v. *Moore*, 93 F App'x 887, 892-893 (6th Cir. 2004); *Fornea*, 140 So. 2d at 383.

Because any defect in the proceedings did not affect Dietz's substantial rights, the judgment below should be affirmed.

## III. THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY POWERS TO IMPOSE A NEW RULE LIMITING THE DISCRETION OF DISTRICT COURTS

Dietz contends that even if "there is a valid basis for a federal court's exercise of authority to recall discharged jurors," this Court should establish, "as a matter of 'sound judicial practice,' that recall is not permitted in these circumstances." Dietz Br. 33 (quoting *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004)). This Court's supervisory powers, however, should "be sparingly exercised," *Lopez* v. *United States*, 373 U.S. 427, 440 (1963), and Dietz has provided no justification for their exercise here.

### A. Dietz's Proposed Rule Would Undermine Fairness

1. Dietz urges this Court to exercise its supervisory powers in light of "profound concerns about the basic fairness of jury trials." Dietz Br. 34. According to Dietz, those concerns take the form of various "*poten-*

*tial*" risks—namely, that jurors "*may* be exposed to outside influence," that they "*may* simply change their minds," and that they "'*may* * * * be[] confused in the[ir] understanding of the instructions.'" *Id.* at 34-35 (emphases added).

But there is already a source of law addressed to "the basic fairness of jury trials": the Constitution. And while Dietz asserts that recalling jurors "implicates" the Constitution, he studiously avoids arguing that it *violates* it. *Id.* at 35. Despite pursuing that argument below, *see* Dietz C.A. Opening Br. 21; *supra* pp. 12-13, he now abandons it. For good reason. The Constitution guarantees the right to a fair trial—a trial before a "panel of impartial, indifferent jurors." *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (internal quotation marks omitted). That is a right to a trial before a jury free of *actual* prejudice. *See, e.g.*, *Skilling*, 561 U.S. at 385; *Rivera* v. *Illinois*, 556 U.S. 148, 159 (2009); *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982); *Remmer* v. *United States*, 347 U.S. 227, 229 (1954); *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950). It is not a right to a trial free of the "mere *opportunity*" for prejudice. *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956) (emphasis added) (internal quotation marks omitted). As this Court has made clear, a claim of "essential unfairness" must "be sustained not as a matter of speculation but as a demonstrable reality." *Id.* (internal quotation marks omitted).

Dietz nevertheless asks this Court to prohibit recalling a jury even in the absence of actual prejudice. This Court should decline that invitation. A showing of actual prejudice is required not only by the Constitution but by the Federal Rules. *See* Fed. R. Civ. P 61; Fed. R. Crim. P. 52(a); *supra* pp. 42-44. This

Court cannot circumvent that requirement by fashioning its own rule, necessitating a new trial whenever there is a mere potential for prejudice. *See Bank of Nova Scotia*, 487 U.S. at 254 ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry * * * "). In making actual prejudice the touchstone of the constitutional inquiry, this Court has never suggested that a different inquiry could be possible if the Court were only to "analyze the question under the supervisory power." *Id.* at 255 (internal quotation marks omitted).

Dietz maintains that his rule would give "better guidance" to lower courts. Dietz Br. 37 But even if that were true, Dietz's proposal should be directed at the Civil Rules Advisory Committee, not this Court. That committee is charged with considering changes to the rules after hearing from all interested parties. This Court should hesitate to impose on its own any rule that has not gone through that process. *Cf. Shannon* v. *United States*, 512 U.S. 573, 587 (1994) (declining to use the Court's supervisory powers to require a jury instruction that Congress could have, but did not, include in the relevant legislation).

2. Dietz's rule does not make sense in any event. As an initial matter, Dietz does not argue that any of the risks he identifies were present in this case. He does not argue, for example, that the jurors here may have been exposed to outside influences, or that the recall may have caused confusion or coercion. Thus, Dietz's concerns would not justify reversal in this case, even if they were legitimate in the abstract.

Dietz's concerns, however, are not even that. He fears that jurors "may be exposed to outside influence" once they have been declared discharged. Dietz Br. 34. But district courts have an age-old tool for uncovering such influence: *voir dire*. *Voir dire* is a well-established way of "ascertain[ing] whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); *see also Skilling*, 561 U.S. at 386-387 (praising the benefits of "in-the-moment *voir dire*"). This case illustrates the point. After recalling the jurors but before allowing them to re-deliberate, the District Court asked them whether they had talked to anyone about the case. Pet. App. 31a. Their answers established that they had not been "contaminated by any outside information." *Id.*

If Dietz had thought this *voir dire* insufficient, he could have objected or requested additional questions. He did not. *Id.* Nevertheless, he now contends that *voir dire* is inadequate to reveal bias acquired after a jury is dismissed, because that is a time when the jurors are not under instructions to avoid outside influences. Dietz Br. 37-38. But *voir dire* is an effective tool for uncovering bias, whenever acquired. In *Skilling*, for example, the Court held that *voir dire* was "well suited" to uncovering bias from publicity prior to trial—when, as here, the jurors were under no instructions to avoid outside influences. 561 U.S. at 384; *see also McDonough*, 464 U.S. at 554 (explaining that *voir dire* can expose even "unknown" biases on the part of a potential juror). A juror's responses during *voir dire* are not any less trustworthy just because the juror is being

asked about a time when he was not under the court's instructions.

Dietz also expresses concern that "jurors may simply change their minds after delivering the verdict" because "[d]elivering a verdict, and observing the reactions to it, are themselves psychologically significant events." Dietz Br. 34-35. He adds that giving the jury a chance to render a new verdict might lead to "confusion, unintended compulsion and, indeed, coercion." *Id.* at 35 (internal quotation marks omitted).

But if these concerns were taken seriously, a jury could *never* be told to go back and render a new verdict. After all, these same concerns would arise any time a jury delivers an invalid or inconsistent verdict, even before discharge. And yet, Dietz acknowledges that these concerns do not always stand in the way of sending the jury back to reach a different verdict. *See id.* at 14-15, 40. Indeed, the Federal Rules expressly authorize a court to "direct the jury to further consider its answers and verdict," Fed. R. Civ. P 49(b)(3)(B), (b)(4), even after the jury has endured what Dietz calls the "psychologically significant," and perhaps "confus[ing]," event of delivering an inconsistent verdict. Dietz's argument proves too much.

Moreover, when the jury's initial verdict is legally impermissible, Dietz's concerns are entirely misplaced. A jury that renders an invalid verdict, contrary to the court's instructions, is already confused. *See* Pet. App. 28a ("Clearly, the verdict somehow is the result of misapprehension on the part of the jury as to their duties in setting damages."). The point of recalling the jury for further instruction and deliber-

ation is to clear up that confusion and allow it to change its mind. Because Dietz's concerns are inapt when, as here, the initial verdict is itself the product of confusion, there is no justification for the categorical rule he advocates.

According to Dietz, recalling a jury is also unfair because "the jurors have ceased to be a properly constituted jury." Dietz Br. 36. But that argument is circular, *see supra* p. 40, and lacks any support in the cases Dietz cites involving "improperly constituted tribunals." Dietz Br. 36. In each of those cases, the tribunal was improperly constituted because of an error affecting the composition of the jury or judicial panel itself. *See Nguyen*, 539 U.S. at 80 (Article IV judge was statutorily ineligible to sit by designation on a federal court of appeals); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (discrimination in the selection of a grand jury); *Davis* v. *Georgia*, 429 U.S. 122, 122-123 (1976) (per curiam) (improper criteria in the selection of a petit jury); *United States* v. *Am.-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960) (retired circuit judge was statutorily ineligible to participate in an en banc decision). Here, by contrast, there is no dispute that these seven jurors *could have* decided this case. *See Nguyen*, 539 U.S. at 79 (distinguishing between "an action which could have been taken, if properly pursued, and one which could never have been taken at all"); Dietz Br. 14-15, 40. The only defect, if any, was in the procedure the court followed. *See supra* p. 43. Because there was nothing wrong with the composition of the jury itself, the jury was not improperly constituted.

3. Far from promoting fairness, Dietz's proposed rule would actually undermine it.

For one thing, Dietz's supposed "bright-line rule" would undermine public confidence in the fairness and integrity of the judicial process by mandating new trials when they are plainly unnecessary. This case is far from the only one that fits that bill. Take the facts of *Lapham*. In delivering the jury's verdict, the foreman handed the clerk signed slips showing verdicts for the plaintiff. 179 N.E.2d at 590. The clerk read the verdicts in open court, and the jurors "nodded their heads in assent." *Id.* Only after the jury was dismissed and left the courtroom did the clerk discover that the foreman had also signed and submitted verdict slips for the defendant. *Id.* The court recalled the jurors and instructed them to decide which forms to submit. *Id.* at 590-591. The jury retired to discuss the matter and eventually returned with verdicts for the plaintiff. *Id.* at 591. Under Dietz's proposed rule, however, the court would have been unable to recall the jury for further instruction and deliberation, even to allow the jury to confirm its "intended" verdict. *Id.* The court would have been required instead to hold a costly new trial. Such an absurd consequence would make our judicial process appear less fair, not more so.

For another thing, Dietz's "bright-line rule" would encourage gamesmanship. A party unhappy with how the trial unfolded could simply remain silent while the jury was discharged. Under Dietz's rule, that would ensure that the jury could not be called back to correct even the most obvious of errors in the verdict. Far from being hypothetical, that is exactly what Dietz's counsel attempted to do here. Despite an error in the jury's verdict that he described as "obvious," Pet. App. 26a, Dietz's counsel sat on his hands while the court dismissed the jury, *id.* at 25a,

hoping to get a "second bite at the apple" in a new trial in front of a new jury. *Id.* at 29a. He objected only after the jury had been pronounced discharged. This behavior all occurred *after* he learned of the $0 verdict, which was, in effect, information that suggested the jury did not believe his client's allegations. Any rule that would encourage such gamesmanship diminishes the appearance of fairness in the judicial system.

### B. Dietz's Proposed Rule Would Undermine Finality

Dietz contends that recalling jurors undermines the "finality of jury verdicts" by subjecting those verdicts to challenge. Dietz Br. 38. But when, as here, a jury returns a legally impermissible verdict, it is only a matter of time until that verdict is thrown out. If the court had not recalled the jury in this case, it would have discarded the $0 verdict soon enough—on Dietz's own motion. *See* Pet. App. 26a (Dietz's counsel arguing that "the verdict is contrary to the undisputed evidence and the law"); *id.* at 35a (Dietz's counsel moving for a mistrial). For Dietz to now express an "interest in [the] finality" of that verdict is quite extraordinary. Dietz Br. 38.

Moreover, there is no telling when this case would have been resolved if the court had granted Dietz's preferred remedy of a new trial. It might have been days, weeks, or even months until a new trial would have taken place. And yet, by recalling the jury, the court was able to enter final judgment *the very next day*. J.A. 10. Indeed, recalling a jury will *always* achieve finality sooner than a new trial.

Dietz warns that permitting recall would mean that jurors could be haled back into court long after

delivering a verdict. Dietz Br. 37-38. But no one is suggesting that a court's authority to recall a jury is unlimited. As noted, the Due Process Clause places important limits on when a jury can be recalled. That Clause prohibits recalling jurors after they can no longer be impartial, and after their memories of the evidence have faded. *See supra* p. 45; *United States* v. *Sweat*, 555 F.3d 1364, 1368 (11th Cir. 2009) (per curiam) (upholding decision not to hold an evidentiary hearing on juror prejudice, given the "likely fogging of memories" in the three months since the jury was dismissed); *United States* v. *Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991) (noting that "the jurors' memories had probably begun to fade" in the three months after the verdict). Following dismissal, one would not have to wait long for either of those things to occur, preventing the jury from being recalled.

It should come as no surprise, then, that Dietz's parade of horribles has not materialized despite this country's long history of courts permitting recall. Dietz points to no actual instances of courts reopening cases "weeks[] or months later," or of jurors being "haled back into court" for a "life sentence" of service. Dietz Br. 38-39. On the contrary, courts have been judicious in their use of recall. *See, e.g.*, *Boone*, 951 F.2d at 1532 (declining to reconvene a jury over two years after trial); *United States* v. *Washington*, 819 F.2d 221, 224-225 (9th Cir. 1987) (declining to recall jury two years after trial). Absent evidence that the problems Dietz hypothesizes are real, this Court should not wield its supervisory powers to restrict the discretion of district courts across the country. *See, e.g.*, *Intel*, 542 U.S. at 265 n.17 (noting that the problems that supposedly justified the Court's exer-

cise of supervisory powers "seem[ed] more imaginary than real" because there was "no evidence whatsoever" that those problems had materialized in 40 years).

### C. Dietz's Proposed Rule Would Undermine Efficiency

Finally, Dietz asserts that "it is far from clear that recall would always be a more efficient alternative than other procedures for remedying an invalid or ambiguous verdict." Dietz Br. 40. Once the jury was dismissed in this case, however, the only alternative to recall was a new trial. And recalling a jury is *always* more efficient than holding a new trial.

Dietz points out that under Civil Rule 59, he would have had 28 days after judgment to file a motion for a new trial challenging the jury's $0 verdict. *Id.* But the fact that Dietz could have waited 28 days to file such a motion only highlights the efficiency of recalling the jury and obtaining a new verdict the next day. The Court should not deny district courts the discretion to avoid costly new trials by recalling a jury. Because Dietz's proposed rule would undermine fairness, finality, and efficiency, it should be rejected.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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MARCH 2016

# ADDENDUM

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## FEDERAL RULES OF CIVIL PROCEDURE

**Civil Rule 1 provides:**

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

**Civil Rule 48 provides:**

> (a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).
>
> (b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.
>
> (c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

**Civil Rule 50 provides:**

> (a) Judgment as a Matter of Law.
>
> (1) *In General.* If a party has been fully heard on an issue during a jury trial and the

court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, as-

sert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

**Civil Rule 51 provides:**

(a) Requests.

(1) *Before or at the Close of the Evidence.* At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence.* After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

**Civil Rule 61 provides:**

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

**Civil Rule 83 provides:**

(a) Local Rules.

(1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose

any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

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No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

No. 15-458

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*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

The question presented in this case concerns the authority of federal courts, which has been understood since the Founding to be granted and delimited by the Constitution, statutes, and rules. This Court has recognized a narrow class of powers not specifically granted to federal courts that are nevertheless implied under Article III of the Constitution because they are necessary to the exercise of other judicial powers. The Court has established a strict test for determining whether claimed powers are inherent in federal courts and has shown restraint in recognizing such powers.

Respondent does not claim that the power to recall discharged jurors for further service in a case is expressly granted to federal courts. Instead, he claims that federal courts have inherent authority to recall discharged jurors. In so doing, however, respondent casts off the requirements this Court has traditionally used to identify inherent powers. His tactic is understandable: the claimed power conflicts with the federal rules of procedure, does not have a long unquestioned history, and is not necessary to the exercise of a court's other powers. In place of the Court's preexisting test, respondent relies on two principles: (1) that courts have inherent power to undo whatever they have the power to do, and (2) that courts have inherent power to use any procedure that would enhance efficiency. That approach would vastly expand the self-appointed powers of federal courts.

Perhaps recognizing the weakness of his merits arguments, respondent suggests that the Court should not address the question presented because petitioner has forfeited his claim that the recall of discharged jurors is impermissible. But petitioner has preserved that claim at every stage, in language so plain it is remarkable respondent would suggest otherwise. The Court should reject respondent's last-ditch effort to save his victory below. Because a federal court does not have the authority to recall discharged jurors, the judgment of the court of appeals should be reversed.

### A. Petitioner Has Not Forfeited Any Aspect Of His Claim That The Recall Of Discharged Jurors Is Impermissible

In an effort to convince this Court "not [to] consider[]" petitioner's merits arguments, respondent asserts that petitioner "never made" those arguments in any forum. Br. 11, 16. That assertion is wholly without merit. Petitioner has consistently claimed that the recall of dis-

charged jurors is impermissible, and made materially the same arguments in support of that claim that he does now.

1. Start with the court of appeals. In the very first paragraph of the summary of argument in his opening brief, petitioner asserted that "the district court was without authority to recall the jury." Pet. C.A. Br. 12. Petitioner noted that "[t]he district court's conduct of the jury is a matter of procedure and the federal rules of procedure control." *Id.* at 13. Petitioner argued that the recall of discharged jurors was an "unlawful procedure," *id.* at 15, and that the jury "lost its authority to decide the case anew" after discharge, Pet. C.A. Reply Br. 8. As petitioner explained, "once a jury has been discharged * * * [it] cease[s] to be a public body and can take no further collective action." Pet. C.A. Supp. Br. 1.

Having asserted below that petitioner was making "no argument [that the district court] acted in a manner inconsistent with due process," Resp. C.A. Br. 27, respondent now argues that that was petitioner's *only* claim. See Br. 12-13. But the court of appeals plainly did not think that it was deciding a constitutional question; it framed the question simply as whether a court "may recall a jury." Pet. App. 12a. The court of appeals acknowledged petitioner's argument that "a jury is no longer an entity after the court discharges it," *id.* at 6a, but it ultimately rejected that argument based on "considerations of fairness and economy," *id.* at 11a.

2. Petitioner's approach on appeal tracked his approach in the district court. Petitioner's counsel argued that "the discharge of the jury * * * is an issue that I think can't be cured." Pet. App. 35a. He explained that, "once [the jurors] [ha]ve been released," it is improper either to "recall them" or to "ask them to amend" their verdict. *Id.* at 27a, 35a.

Petitioner's counsel did *also* express a concern about whether petitioner could "get a fair and impartial verdict at this point given what [the jury has] done." Pet. App. 26a. And no wonder: by returning a verdict of $0 in the face of stipulated damages of $10,136, the jury had engaged in an act of nullification, and its ability to render an impartial verdict in petitioner's case was thus highly questionable. See *ibid.* But that was never petitioner's *only* claim.

3. Respondent's belligerent assertion that petitioner has engaged in a "bait-and-switch" before this Court, Br. 16, is utterly unfounded.

Respondent contends that, "[t]hroughout the certiorari stage, [petitioner] characterized the question presented as one of federal constitutional law." Br. 15. The certiorari-stage briefs refute that contention. The question presented does not mention the Constitution; it simply asks whether "[a] judge may recall [discharged] jurors for further service," which comfortably encompasses the argument that a judge lacks the *authority* to do so. Pet. i. In describing the conflict among the federal courts of appeals, petitioner nowhere refers to any constitutional question. See Pet. 8-13, 15. And to the extent petitioner noted a similar division of authority among state courts, he made clear it was relevant because it illustrated the recurrence of the question presented and because "federal courts routinely discuss the reasoning of state-court decisions" in addressing that question. Pet. Reply 9-10.

Insofar as petitioner referred to federal constitutional rights in his petition for certiorari, he did so in almost exactly the same words as he later did in his opening merits brief, pointing out that jury recall "*implicates* the fundamental guarantee of a fair trial in a fair tribunal, as embodied in the specific constitutional rights to a jury

trial as well as the broader right to due process." Pet. Br. 35 (emphasis added; internal quotation marks omitted); see Pet. 16. On that point, petitioner and respondent actually agree. See Resp. Br. 24. For present purposes, however, the takeaway is that petitioner did not advance a freestanding constitutional question.

Respondent's "new" counsel claims "surprise" at petitioner's argument that a federal court lacks the authority, under the federal rules of procedure, to recall discharged jurors. See Br. 15. If so, respondent's new counsel must not have talked with his old counsel. In his brief in opposition, respondent argued that "the question presented does not raise a [c]onstitutional issue," Br. in Opp. 18, but instead "is one of federal procedure," *id.* at 17. Respondent added that such questions "are controlled by federal procedural law," citing (oddly) Federal Rule of Civil Procedure 49(b). *Ibid.*

Respondent's spurious claims of forfeiture debase the preservation rules and distract from the merits of the important question presented here. We turn now to that question.

### B. A Federal Court Lacks Inherent Authority To Recall Discharged Jurors

Respondent does not argue that the federal rules give a district court express authority to recall discharged jurors for further service in a case. Instead, respondent, joined by the government, relies entirely on the inherent authority of the federal courts. See Resp. Br. 17-42; U.S. Br. 8-32.

Respondent skirts, and the government blatantly ignores, this Court's repeated admonition that the inherent authority of federal courts under Article III of the Constitution "must be delimited with care" because of the "danger of overreaching when one branch of the

Government * * * undertakes to define its own authority." *Degen* v. *United States*, 517 U.S. 820, 823 (1996). Instead, respondent seeks to redefine the strict requirements for inherent authority almost out of existence. Respondent would replace the "necessity" requirement with a watered-down "reasonableness" standard. He would deem efficiency to be a sufficient justification for inherent authority, even where the rules already provide a concededly adequate remedy for the claimed error. And he would assess inherent authority at an impossibly high degree of generality, thereby ensuring that any limitations on it would rarely if ever be transgressed.

This Court should not sanction such a dramatic loosening of the standards for inherent authority. Under the existing standards, no inherent authority to recall discharged jurors can be found.

1. Respondent contends that a federal court has inherent authority to recall discharged jurors simply because the federal rules of procedure do not expressly prohibit it. See Br. 25-30. That is not the standard this Court has adopted. Claimed inherent powers cannot "circumvent or conflict with" the federal rules, and the Court has rejected claimed inherent powers that do so. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996).

a. Under respondent's claimed inherent power, it is as if the federal rules provide that "the court may recall the jury at any time after the jury is discharged." But Civil Rule 51(b)(3) provides that "[the court] may instruct the jury at any time before the jury is discharged." Permitting a district court to recall jurors after discharge for the purpose of further instructing them and ordering them to deliberate anew would "effectively annul[]" the "before * * * discharge[]" limit in Rule

51(b)(3) by reading it out of the rule entirely. *Carlisle*, 517 U.S. at 426.

In that respect, this case is more egregious than *Carlisle*, which involved the time limit for filing a motion for judgment of acquittal under Criminal Rule 29(c). Respondent attempts to distinguish *Carlisle* on the ground that another rule prohibited courts from extending that time limit. See Br. 29. But the Court also considered whether a federal court possessed inherent authority to enter a judgment of acquittal *sua sponte* outside the time limit—a question as to which both rules, which spoke only to *motions* for acquittal, were silent. See 517 U.S. at 426. The Court concluded that recognizing such a power would "effectively annul[]" the rule. *Ibid.* Here, Rule 51(b)(3) imposes a limitation directly on district courts; the Court cannot recognize an inherent power to disregard that limitation.

Respondent argues that Rule 51(b)(3) authorizes courts to instruct juries before discharge but does not affirmatively deny courts the power to instruct juries after discharge. See Br. 27. In *Carlisle*, however, this Court rejected a materially identical argument about a similarly "permissive" rule. See 517 U.S. at 431-432. Respondent also contends that recalling jurors after discharge for further instruction would not contravene the "before * * * discharge[]" limit, because the court has "undo[ne]" the discharge and any further instruction would occur before the jury is discharged again. See Br. 27. At a minimum, however, such an artifice "circumvent[s]" the rule and thus is beyond the scope of a court's inherent authority. See *Carlisle*, 517 U.S. at 426.

Respondent observes that the "before * * * discharge[]" limit was recently added to Rule 51(b)(3) and, quoting an advisory committee note, asserts that the modification was intended to reflect a supposed "com-

mon practice" favoring jury recall. See Br. 28. But that quotation is selective. In fact, the note states that Rule 51(b)(3) "reflects common practice by authorizing instructions at any time after trial begins and *before the jury is discharged.*" Fed. R. Civ. P. 51 advisory committee's note (2003) (emphasis added). The note thus confirms that the "common practice" was to instruct juries only before they are discharged, not after.

b. Respondent makes little effort to confront the other rules that demonstrate the absence of any authority to recall discharged jurors. For example, in the case of a bench trial, Civil Rule 59 permits a court to respond to a motion for a new trial by effectively continuing the previous trial. In the case of a jury trial, however, no such continuation of the first trial, by recall of the jurors or otherwise, is authorized; the rule permits only a new trial.

Respondent's only explanation for this difference is that a new trial is a different remedy from jury recall. See Br. 29. But that misses the point: the former remedy is authorized by the rules, and the latter is not. The fact that the rules provide for further proceedings in a bench trial, but not in analogous circumstances in a jury trial, demonstrates that the absence of an affirmative authorization for jury recall was no mere oversight.

2. Respondent suggests that this Court could recognize an inherent power even in the absence of a long history of courts exercising that power. See Br. 30-38. Respondent is wrong both on the law of inherent authority and on the history of jury recall.

a. As petitioner has explained, this Court has required parties claiming an inherent power to show that exercise of that power has a "long unquestioned" history. *Carlisle*, 517 U.S. at 426, 427 n.5, 431. Indeed, this Court has never recognized an inherent power without such a

history. The cases on which respondent relies are not to the contrary, because they either identified such a history or did not involve a pure question of inherent authority. See *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980); *Thomas* v. *Arn*, 474 U.S. 140, 145 (1985).

b. Respondent correctly conceded below that "[i]t has long been the general rule that a jury could not be recalled to amend its verdict after being discharged and separating." Resp. C.A. Br. 23. In arguing otherwise to this Court, respondent seriously mischaracterizes the state of the law.

i. In many of the cases respondent cites (and in many of the cases respondent wrongly accuses petitioner of "falsely" describing, Br. 32), the courts took a functional view of "discharge," permitting recall only up to the point at which the jurors left the judge's presence and control. See *Brister* v. *State*, 26 Ala. 107, 132 (1855); *Levells* v. *State*, 32 Ark. 585, 590-591 (1877); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983).

For example, in *Summers* v. *United States*, 11 F.2d 583 (4th Cir.), cert. denied, 271 U.S. 681, 586 (1926), the court laid out the "general rule" that, after the jury has been "discharged [and] ha[s] separated, the jury cannot be recalled to amend their verdict." At the same time, the court recognized that a jury may remain effectively undischarged despite a judge's pronouncement of discharge, if it remains within the court's control. *Ibid.* The adoption of a functional view of "discharge" does not demonstrate authority for a court to recall discharged jurors; instead, it merely confirms that a court's authority over the jury ends at the point of discharge, however

that point is defined. And there is no dispute that the jury was discharged here. See Pet. Br. 31 n.6.

In many of the other cases respondent cites, the jury was not reassembled for the purpose of further deliberations. See *Ira Green, Inc.* v. *Military Sales & Service Co.*, 775 F.3d 12, 26 (1st Cir. 2014); *United States* v. *Rojas*, 617 F.3d 669, 678 (2d Cir. 2010); *United States* v. *Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994); *Mitchell* v. *State*, 22 Ga. 211, 236 (1857); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675 (1898); *Lapham* v. *Eastern Massachusetts Street Railway Co.*, 179 N.E.2d 589, 593 (Mass. 1962); *Cole* v. *Laws*, 10 S.E. 172, 174 (N.C. 1889); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Roberge*, 582 A.2d 142, 144-145 (Vt. 1990).

For example, in the earliest federal case respondent identifies, *Burlingame* v. *Central Railroad*, 23 F. 706 (C.C.E.D.N.Y. 1885), the judge had recalled the jurors to determine whether the recorded award of $3,500 to the plaintiff was the verdict the jury had intended. *Ibid.* Based on testimony from the foreman and an affidavit from the jurors, the judge determined that the jury had intended to award interest and corrected the verdict. *Ibid.* The appellate court recognized "[t]he power of the court to cause the verdict to be corrected." *Id.* at 707. But it did not address the authority of a court to recall jurors for the purpose of deliberating anew and reaching an entirely different verdict. As petitioner has noted, a judge has long possessed the authority to correct a mistake in the reported verdict, but not to reassemble the jury for further deliberations after a *correctly* reported verdict. See Pet. Br. 27.

The few remaining cases respondent cites (most of which are relatively recent) simply demonstrate the ex-

istence of the conflict of authority that triggered this Court's review. Obviously, the mere existence of *some* lower-court authority is insufficient to demonstrate a "long unquestioned" history of courts exercising an inherent power. Were it otherwise, the inquiry would by definition end in virtually every inherent-authority case in which the Court grants certiorari.

ii. As to the authorities cited by petitioner, respondent does not dispute that the established rule in England before the Founding, and in the United States shortly thereafter, forbade the recall of discharged jurors. Instead, respondent attempts to dismiss the early authorities as "irrelevant or outdated." Br. 35. But those authorities are significant precisely because of their dates: they establish that there is no long unquestioned history of courts recalling discharged jurors. See Pet. Br. 25-26 (citing cases).

Respondent contends that some of those authorities "lack reasoning" or rest on "concerns about juror impartiality." Br. 32. Again, that misses the point: whatever the reason, courts at the time of the Founding did not consider themselves able to recall discharged jurors. And respondent's contention gives the lie to the government's (unfounded) contention that the long line of early authorities rested on a supposedly "technical" rule unrelated to concerns about the fairness of proceedings. See U.S. Br. 28.

Respondent ultimately concedes, as he must, that early courts prohibited the recall of discharged jurors, but he attempts to link that rule with the rule of sequestering jurors. See Br. 34-35. It simply does not follow from elimination of the requirement of jury sequestration, however, that district courts now have the affirmative authority to recall discharged jurors for further service. It is one thing for a court not to exercise its power

to sequester jurors who are deliberating and still under instructions; it is quite another to permit a court to recall jurors when they have separated after discharge and have been *released* from their instructions. And as respondent acknowledges, the requirement of sequestration "persisted well into the twentieth century," Br. 34; its recent abandonment could scarcely give rise to a "long unquestioned" power to recall discharged jurors.

3. Respondent would cast off the venerable requirement that an inherent power be "necessary to the exercise of" a federal court's other powers, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). See Br. 38-40. Respondent instead relies on a single sentence from this Court's decision in *Degen* requiring that the exercise of an inherent power be a "reasonable response to the problems and needs that provoke it," 517 U.S. at 823-824—ignoring the Court's subsequent statement that an inherent power must be sufficiently "limited by the necessity giving rise to its exercise," *id.* at 829, and its holding that the claimed inherent power was invalid because "[t]here was no necessity to justify" it, *ibid.*

This Court has never recognized an inherent power apart from those essential to the functioning of a court and the enforcement of its decrees. Respondent relies on *Chambers* for the proposition that "necessary" merely means "useful." See Br. 38. But the Court has never adopted that meaning. To the contrary, in the statement respondent quotes from *Chambers*, the Court was merely reciting a party's argument, which it did not adopt. See 501 U.S. at 47 n.12. In fact, the Court recognized in *Chambers* that an inherent power to sanction the bad-faith conduct at issue was necessary because "[m]uch of the bad-faith conduct * * * was beyond the reach of

the [federal] [r]ules," yet could not be tolerated by a court. *Id.* at 50-51. The Court has steadfastly adhered to the principle that tethering inherent powers to necessity (and history) serves as an important check on the judiciary in defining the scope of its own authority. See *Degen*, 517 U.S. at 823.

b. The claimed power to recall discharged jurors is unnecessary because the existing rules provide concededly adequate procedures for remedying an invalid or ambiguous verdict after the jury has been discharged. The remedy for an invalid verdict is a new trial, see Fed. R. Civ. P 59, and the remedy for an error in recording the verdict is a streamlined proceeding to correct it, see Fed. R. Civ. P 60(a). While respondent erroneously contends that it is the view of Justice Kennedy alone, see Br. 39, the entire Court agreed in *Degen* that "[t]he existence of * * * alternative means of protecting the [relevant] interests * * * shows the lack of necessity" for an inherent power. 517 U.S. at 827.

According to respondent, the only respect in which jury recall is superior to the primary existing remedy for an invalid verdict—a new trial—is expediency. See Br. 39. While respondent adds that recall is "just" and "narrowly tailored," he does not dispute that the same is true of a new trial, which justly and precisely remedies an invalid verdict. *Ibid.* A new trial may be less efficient, but that is not enough to give rise to inherent authority—as respondent concedes. See *ibid.*

If respondent truly wanted to avoid any inefficiency associated with a new trial, moreover, he could have invoked another remedy: objecting to the invalid verdict while the jury remained empaneled and affording the judge the option of reinstructing the jury for further deliberations. At the time of the jury's verdict, respondent's counsel knew full well that the verdict was invalid,

because he had just argued to the jury that it had an "obligation under the law" to award petitioner at least $10,136. 4/17/13 Tr. 242. If respondent's counsel wanted to save the verdict from invalidation (and to have a jury obviously sympathetic to his client, rather than a new jury, conduct further deliberations), he could have spoken up. But when the jury returned its verdict, what did counsel say? Nothing. See Pet. App. 25a. Given the available alternatives, it is entirely unnecessary to recognize an inherent authority to recall jurors after discharge.

4. Unable to satisfy this Court's strict requirements for inherent authority, respondent resorts to analogy. Specifically, respondent contends that courts have inherent authority to correct errors, manage their dockets, and rescind interlocutory orders before final judgment—and that, in combination, those generic "powers" beget an inherent power to recall discharged jurors. See Br. 18-22.

As a preliminary matter, inherent authority should not be considered at such a high level of generality, with the result that a court need only claim vague authority to "correct errors" in order to arrogate power unto itself. When this Court has assessed claims to inherent authority, it has defined the asserted inherent power with specificity. See, *e.g.*, *Degen*, 517 U.S. at 823; *Carlisle*, 517 U.S. at 426; *Chambers*, 501 U.S. at 42.

In any event, respondent's argument fails because the general principles he identifies are not absolute. In *Carlisle*, this Court rejected a claim of inherent authority to grant a motion for judgment of acquittal filed one day late, even though the district court had found that the failure to grant relief would result in "grave injustice." 517 U.S. at 419. That refutes respondent's assertion that a district court has unlimited authority to cor-

rect errors (and to manage its docket) as long as it retains jurisdiction over a case.

It is equally fanciful to suggest that a district court has absolute authority to rescind interlocutory orders before final judgment. To be sure, the federal rules contain a broad grant of such authority. See Fed. R. Civ. P 54(b). But it is well established that a federal court lacks the authority to correct various types of orders even before final judgment. For example, once a court orders a change of venue and transfers the case files, it has no power to rescind that order. See, *e.g.*, *Miller* v. *Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009). A judge who recuses himself from a case may not reconsider his order after the case has been transferred to another judge. See, *e.g.*, *El Fenix de Puerto Rico* v. *M/Y Johanny*, 36 F.3d 136, 141 (1st Cir. 1994). And a court that enters a final judgment dismissing certain claims or parties to allow an appeal relinquishes jurisdiction over those claims or parties, even if it retains jurisdiction over the remainder of the case. See Fed. R. Civ. P. 54(b); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). An order discharging a jury is like the foregoing types of orders: it is "final" in the relevant sense, because discharge relieves the jury of its authority over the case. Such an order is an unalterable relinquishment of authority and is not subject to modification.

Finally on this score, the specific inherent powers that respondent and the government identify are irrelevant here. The powers to issue stays and to make evidentiary rulings *in limine* may serve a court's interest in structuring its own proceedings while a case is pending, but they say nothing about a court's power—after a jury completes its task, returns its verdict, and is discharged—to provide an additional remedy beyond those already provided by the federal rules. Similarly, an ap-

pellate court may have the power to recall its mandate in cases involving "grave, unforeseen contingencies," *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998), but that hardly indicates that a district court possesses inherent authority to recall jurors for further deliberations after the jury returns an invalid verdict—a situation that is both eminently foreseeable and already covered by existing remedies.

Respondent's efforts to circumvent this Court's strict requirements for inherent authority by resort to analogy are unavailing. Because none of those requirements is satisfied here, the district court lacked the authority to recall the discharged jurors.

### C. Upon Discharge, A Juror Returns To Being An Ordinary Citizen

Respondent contends that it is "circular" to argue that a court lacks authority over jurors once they have been discharged. See Br. 40-42. That contention lacks merit.

1. Petitioner's argument accords with the universal understanding of what it means for a jury to have been "discharged." Consistent with the ordinary meaning of the term, "discharge" marks a jury's release from service; upon discharge, jurors are relieved of their authority over the case and return to being ordinary citizens. See Pet. Br. 18-22. While respondent chastises Chief Judge Cardozo for failing to provide a citation, see Br. 41, he was merely capturing that universal understanding when he stated that, upon discharge, "[the jury] has ceased to be a jury," and its members are no longer "an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929).

Respondent's approach cannot be reconciled with that understanding. Under respondent's approach, a

discharged juror would remain a "juror" under the district court's authority for an indefinite length of time. The only limits on a district court's power to recall discharged jurors would be those imposed by due process: specifically, when jurors "can no longer be impartial" or "their memories of the evidence have faded." Br. 52.

The implication of respondent's approach is that district courts possess potentially lifelong authority over former jurors. Respondent's response to the hypothetical of a former juror who refuses to agree to a court's recall is telling. See Br. 41-42. Respondent seemingly takes the view that a court could compel discharged jurors to return to service in a case, just as it could compel jurors who remain empaneled to return after a recess. Under respondent's approach, therefore, a court could hold a former juror in contempt (as it could a sitting juror) for failure to return upon the court's order, even long after the proceedings have ended. That cannot be the law.

2. Recognizing the troubling consequences of such an unbounded rule, the government contends that the power to recall discharged jurors is cabined by "discretionary" principles. Thus, the government argues, it would be presumptively improper—make that "strong[ly]" presumptively improper—for a court to recall jurors after they "have returned to their homes and daily lives" or "more than an hour after the jury was discharged" (whichever comes first?). Br. 5-6, 22. That purportedly "strong" presumption could be overcome, however, where the problem with the verdict is merely a clerical one: for example, where "the jurors would be asked only to clarify unclear handwriting in a damages amount on a verdict form." Br. 23. And in all events, a district court could not recall discharged jurors if it hap-

pens to enter final judgment immediately after the jury returns its verdict. See Br. 22.

In support of this impossibly reticulated, quasi-legislative scheme, the government contends that cases in which district courts would attempt to recall jurors "more than an hour" after discharge will be "exceptionally rare." Br. 23. But courts have attempted to recall jurors days, weeks, and even months after discharge. See, *e.g.*, *People* v. *Hendricks*, 737 P.2d 1350, 1352 (Cal. 1987) (over five months); *Drop Anchor Realty Trust* v. *Hartford Fire Insurance Co.*, 496 A.2d 339, 345 (N.H. 1985) (five days).

More broadly, if the government is serious about imposing a presumptive one-hour limit on a court's authority to recall discharged jurors, it is hard to see why a rule permitting recall is worth the candle. A judge can always double-check the verdict for obvious infirmities before discharging the jury, rather than in the hour after. Indeed, in this case, the judge's decision to discharge the jury was inexplicable, because the judge himself had recognized, less than an hour earlier, that a "verdict in less than th[e] [stipulated] amount" would be improper. J.A. 36. There is no valid justification for this Court to invent the jurisprudential equivalent of the five-second rule under the guise of inherent authority.[1]

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[1] Should this Court conclude that a federal court has inherent authority to recall discharged jurors for further service in a case, it should at a minimum establish a bright-line rule against recalling discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew to reach a different verdict. See Pet. Br. 33-41. Any interest in expediency does not outweigh the interests in fairness and finality that a rule permitting recall in those circumstances would implicate. See *ibid.*

### D. The District Court's Error In Recalling The Discharged Jurors Could Not Have Been Harmless

Finally, respondent contends that, if district courts do not have authority to recall discharged jurors, the error in recalling the discharged jurors here was harmless because the district court determined that the jurors had not talked to anyone else about the case during the period of discharge. See Br. 42-44. Even assuming that the district court's prejudice inquiry was sufficient, respondent's contention fails because the error could not have been harmless.

1. The question presented is whether a federal court has the authority to recall discharged jurors for further service in a case. An action by a federal court that exceeds its Article III powers is traditionally not amenable to harmless-error analysis, because a contrary rule would sanction the exercise of authority that the court does not possess. Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988). And just as the district court lacked the power to recall the discharged jurors, the discharged jurors lacked the power to act. It is well established that the decision of an improperly constituted tribunal is void, without regard to whether the constitution of the tribunal caused any prejudice. See Pet. Br. 36 (citing cases).

Respondent contends that, because the jury could have rendered a valid verdict if it had not been discharged, the issuance of a similar verdict after discharge must be harmless. See Br. 43. But the cases on improperly constituted tribunals belie that contention. For example, in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960), this Court vacated the decision of an en banc appellate panel, without regard to prejudice, because the panel included a retired judge who was ineligible to participate in the en banc proceed-

ings. It was of no moment that the judge had served on the original panel before retiring, or that the judge could have served on the en banc panel if he had not retired in the interim. At the time the decision was rendered, the judge was ineligible to serve on the en banc panel, and its judgment was therefore void. See *ibid.* So too here, the fact that the jury could have rendered a valid verdict before it was discharged is simply irrelevant.

2. For its part, the government advances a mutant version of a harmless-error argument. It contends that the error at issue was the "mistaken discharge"; because that error was a "technical" one, the harmless-error rule (as codified in Civil Rule 61) requires a court to choose the less "drastic" remedy of jury recall over the remedy of a new trial. Br. 15.

That argument is seriously flawed. To begin with, the error that petitioner is challenging was the decision to recall the discharged jurors—and that is therefore the only error to which harmless-error analysis could even arguably apply. And the *underlying* error that jury recall was designed to address was not the "mistaken discharge" of the jury; instead, it was the jury's invalid verdict. There is nothing erroneous about a court's decision to discharge a jury after it completes its task and returns a verdict, even if the verdict ultimately cannot stand. If the district court in this case had not recalled the jury and permitted it to reach a different verdict, petitioner would hardly have appealed the decision to discharge the jury; he would have appealed the jury's verdict (as embodied in the final judgment).

When that conceptual flaw in the government's argument is understood, the entire argument collapses. A verdict that is contrary to the weight of the evidence is hardly a "technical" error; it is the archetypal prejudicial error that justifies a new trial. See *Gasperini* v. *Center*

*for Humanities, Inc.*, 518 U.S. 415, 433 (1996). And, of course, a new trial is precisely the remedy that the federal rules actually provide. See Fed. R. Civ. P. 59; cf. Fed. R. Civ. P. 60(a) (providing a streamlined remedy for "technical" errors in recording verdicts).

By its own admission, the government is asking this Court to recognize a new type of remedy for invalid verdicts, and a new type of post-verdict motion to coexist alongside a motion for a new trial: namely, a "mo[tion] to revoke the discharge." U.S. Br. 18. But while the harmless-error rule permits the correction of errors that do not affect substantial rights, it does not operate to endow federal courts with powers that they do not otherwise possess. If the government would like federal courts to have the power to recall discharged jurors (at least for a one-hour grace period), it should not ask this Court to recognize that power under Article III of the Constitution or through the back door of the harmless-error rule. It should instead take up the matter in the appropriate forum—the Advisory Committee on the Rules for Civil Procedure.

* * * * *

Because a federal court does not have inherent authority to recall discharged jurors for further service in a case, the judgment of the court of appeals cannot stand. That judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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No. 15-458

# In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether a district court may revoke an order discharging a jury before the jury had returned a legally acceptable verdict.

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# In the Supreme Court of the United States

No. 15-458

ROCKY DIETZ, PETITIONER

*v.*

HILLARY BOULDIN

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents the question whether a district court may revoke an order discharging a jury before the jury had returned a legally acceptable verdict. The United States has faced similar questions in criminal prosecutions and has an interest in the adoption of procedural principles that promote an efficient and fair system of adjudication.

### STATEMENT

1. At an intersection in Bozeman, Montana, respondent failed to stop for a red light and collided with the passenger side of petitioner's vehicle. Petitioner sued respondent in Montana state court for negligence. Respondent removed the case to federal court on the basis of diversity jurisdiction. Pet. App. 2a; Resp. Br. 1-2 & n.1.

The district court held a jury trial, with a magistrate judge presiding. D. Ct. Doc. 9 (Aug. 9, 2011). Respondent conceded that his negligence had caused the accident, contesting only the amount of damages. Pet. App. 2a. His counsel told the jury during closing arguments that it had the "obligation under the law" to award "a little over 10,000" dollars for stipulated medical expenses, plus a reasonable amount for future expenses. 4/17/13 Tr. 242-244. Consistent with those concessions, the judge instructed the jury that the parties agreed that respondent was negligent and that the jury was required to award an amount that would compensate petitioner for his injuries. *Id.* at 224-225.

After retiring to deliberate, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36. The judge responded with a note stating: "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." J.A. 37. The judge considered whether the question reflected that the jurors did not understand that "their verdict may not be less than that amount." J.A. 36. But he ultimately concluded that respondent's counsel had "made it crystal clear that they have to award that amount," and that he had decided not to "include an instruction * * * saying that that sets the floor," because "for some people, that sets the ceiling." J.A. 37.

The jury returned a verdict awarding petitioner zero dollars. Pet. App. 22a. After the parties declined to request a poll, the judge thanked the jurors for their service and told them: "You're free to go. The jury's discharged." *Id.* at 25a.

As the judge explained for the record, "moments after having dismissed" the jurors, he had "a fairly

quick second thought" that the verdict was not "legally possible in view of stipulated damages exceeding $10,000," and he therefore "stopped the jury from leaving the building." Pet. App. 26a, 29a-30a. He concluded that "[c]learly, the verdict somehow is the result of misapprehension on the part of the jury," and he stated that he would "hate to just throw away the money and time that's been expended in this trial, not only by the Court but by the parties, when we all know that a new trial will be mandatory." *Id.* at 28a.

The jurors then reentered the courtroom. Pet. App. 29a. The judge explained to them that he could "[]not accept the verdict" because the "verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.* at 30a. To ensure that the jurors had not been exposed to any improper outside influence during the "brief interlude" since their discharge, the judge put that question to the jurors, asking "any of you" whether "anything occur[red] during * * * the few minutes after you were discharged where you talked to anybody about the case outside your immediate numbers." *Id.* at 30a-31a. They responded no, and one juror stated that "[m]ost of us were just outside the door here." *Id.* at 31a. Because a court clerk had told the judge that one juror had "left the building to go get his hotel receipt," the judge said to the jury that he understood that "one juror had gone to the first floor and it was maybe to get a hotel receipt." *Id.* at 28a, 31a. A juror responded that he "did that" but "didn't talk to anybody." *Ibid.*

The following morning, petitioner moved for a mistrial on the ground that "the discharge of the jury * * * is an issue that * * * can't be cured." Pet.

App. 35a. The judge denied the motion. *Id.* at 37a. The jury resumed deliberations and returned a verdict awarding petitioner $15,000 in damages. *Id.* at 38a, 40a.

2. The court of appeals affirmed. Pet. App. 1a-17a; J.A. 39-40. The court held that "a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Pet. App. 12a. Applying a "totality of circumstances analysis" to the record in this case, the court concluded that the judge's "questioning adequately confirmed the jurors had not been exposed to prejudicial influences during the brief period between dismissal and recall," and therefore that the judge's "decision to recall the jurors was * * * not an abuse of discretion." *Id.* at 13a, 17a. The court found it significant that "the recall occurred very shortly after the dismissal," *id.* at 17a, and that the judge "specifically asked the jurors whether they had spoken to anyone about the case," *id.* at 15a.

Judge Bea concurred in the judgment, expressing the view that objecting parties, not the court, should initiate a prejudice inquiry. Pet. App. 18a-20a.

## SUMMARY OF ARGUMENT

In this case, the district court realized a few minutes after discharging the jury that the verdict was legally impermissible. The court did not abuse its discretion in revoking the discharge order and resubmitting the case to the jury to render an acceptable verdict.

A. A district court has basic legal authority to revoke an order discharging a jury. A district court may vacate or revise an interlocutory order any time before final judgment, and no statute or rule carves out an exception from that general authority for jury-discharge orders. Most critically, the authority to vacate an order of discharge is appropriate in some circumstances to comply with the foundational precept of modern federal procedural law: that a trial error or defect should lead to a new trial only when "justice requires," that is, when the error cannot be remedied in a more tailored and less unsettling way that avoids impairing any party's "substantial rights." Fed. R. Civ. P 61. Under that bedrock principle, a judge who mistakenly discharges a jury before it has returned a legally acceptable verdict has the authority to remedy that error by revoking the order of discharge and resubmitting the case to the jury, so long as doing so would not unfairly prejudice any party.

Accordingly, revocation and resubmission are proper when jurors have not been exposed to prejudicial outside influence or otherwise been rendered incapable of reaching a fair verdict. District courts can draw upon a deep well of experience in conducting a prejudice inquiry, because courts apply the same prejudice standard in other contexts in which a question is raised about juror impartiality—including where a juror is actually exposed to improper outside influences or extraneous information about the case midtrial. Given the natural propensity of jurors to talk to friends and family about a completed trial, however, it will be the rare case in which a district court could conclude that revocation and resubmission are proper after jurors have returned to their homes

and daily lives. But in cases involving very short periods of discharge—here, a few minutes—courts should have the authority to resubmit the case to the jury rather than nullify an entire trial if the jurors were not exposed to any prejudicial taint. In this case, in light of the de minimis period of discharge and the jurors' statements that they did not discuss the case with anyone, the district court did not abuse its discretion in revoking the discharge and resubmitting the case to the jury.

B. This Court should reject petitioner's draconian rule, which would categorically bar revocation of the discharge of a jury. Apart from his erroneous contention that the revocation of a discharge is "implicitly prohibited" by Federal Rules of Civil Procedure addressing jury instructions and juror polling, petitioner relies principally on what he portrays as a uniform tradition in 19th-century state judicial systems. But early practice was not as uniform as petitioner suggests, and in any event petitioner's historical argument ignores two intervening legal events of overriding significance: the modern judicial system's rejection of the Founding-era rule that juries could not separate during deliberations, and the enactment of the first harmless-error statute in 1919, which superseded the older tradition in which even technical or trivial trial defects required a new trial.

Petitioner's categorical prohibition against revocation of the discharge of a jury would impose substantial costs on the judicial system, parties, witnesses, and jurors out of all proportion to its perceived benefits. Even where the jurors stepped out into the hallway or a court parking lot for only a few minutes after a mistaken discharge and did not talk to anyone about

the case, petitioner would unflinchingly require a complete do-over of a trial that might have lasted weeks or months. That rule would substantially burden the public by requiring the court to call into service another group of citizens to sit for the new trial when the first jury might have clarified or completed its verdict in short order.

C. The standard proposed here comports with the basic fairness requirement of the Due Process Clause, and petitioner was in no way deprived of his right to a jury trial under the Seventh Amendment when the court ensured that the jury completed its work.

## ARGUMENT

When a jury returns a verdict that is facially incomplete, ambiguous, or invalid, the court must decide whether to resubmit the case to the jury or whether the jury's confusion is so severe that the court must declare a mistrial. See, *e.g.*, *Jones* v. *Southpeak Interactive Corp.*, 777 F.3d 658, 674 (4th Cir. 2015); see also Fed. R. Civ. P 49(b)(3) and (4); accord Pet. Br. 14-15. In this case, the verdict revealed that the jurors had labored under the misapprehension that they did not need to award the agreed-upon baseline damages amount. As the case comes to this Court, the parties do not challenge the trial court's conclusion that the verdict was not "legally possible" and therefore could "not be accepted by the Court," Pet. App. 26a-27a. Nor do they dispute that the court had discretion to resubmit the case to the jury with a clarifying instruction before discharge. But the trial judge did not notice the error in the verdict until a "few minutes" after he had formally discharged the jury, while most of the jurors were just out in the hall. *Id.* at 31a. Petitioner contends that in a circumstance like

that, the only lawful course of action is to order a new trial, empanel a new jury, and try the entire case over again—even if the period of discharge was only a matter of minutes, and even if the trial had lasted weeks or months.

This Court should reject that rigid rule. As with any other interlocutory order, a district court has the basic legal authority to revoke an order discharging the jury before entering final judgment, but the court may resubmit the case to the jury only if doing so would not prejudice the substantial rights of any party. A foundational precept of modern federal procedural law, embodied in Federal Rule of Civil Procedure 61, is that technical errors or defects in a proceeding should be disregarded unless justice requires a new trial. That represented a conscious break with an older tradition in which the most trivial irregularity would nullify an entire trial. Under that core principle, where a district court can employ a remedy short of ordering a new trial to correct an error—here, mistakenly discharging the jury before it had returned a legally acceptable verdict—it has discretion to choose that course.

### A. A District Court May Revoke A Discharge And Resubmit The Case To The Jury When Doing So Would Not Unfairly Prejudice Any Party

A district court has the legal authority to revoke a discharge order and resubmit the case to the jury when, applying the standard used in other contexts to ensure the impartiality of jurors, it determines that the jurors have not been exposed to any prejudicial outside influence or otherwise been rendered incapable of reaching an impartial verdict. The district court

did not abuse its discretion in making that determination here.

*1. A district court has the authority to revoke an order discharging a jury*

Petitioner's contention that district courts lack the power to revoke the discharge of a jury is incorrect.

a. District courts have broad authority to manage their proceedings, subject to limits imposed by the Constitution, federal statutes, and the rules of procedure and evidence. As this Court explained in 1936, there exists "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North Am. Co.*, 299 U.S. 248, 254. "How this can best be done," the Court explained, "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-255.

When this Court adopted the Federal Rules of Civil Procedure the following year, it expressly preserved in Rule 83 the authority of district courts to "regulate their practice in any manner not inconsistent with these rules." Fed. R. Civ. P 83 (1938); accord Fed. R. Civ. P 83(b) (current). As the advisory committee's note accompanying the 1944 adoption of the corresponding Federal Rule of Criminal Procedure explained, "it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or by usage." Fed. R. Crim. P 57 advisory committee's note. Thus, for example, although the federal rules "do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the

course of trials." *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984).

Like other issues of trial management, "[t]he management of juries traditionally lies within the sound discretion of the trial judge." *United States* v. *Wiesner*, 789 F.2d 1264, 1268 (7th Cir. 1986). Federal law expressly addresses only a limited subset of procedural issues that might arise in jury trials. See 28 U.S.C. 1865, 1870, 1871; Fed. R. Civ. P 48(a). The Federal Rules deliberately leave many such matters to judicial discretion, including "the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, * * * and other similar details." Fed. R. Crim. P 57 advisory committee's note (1944).

Petitioner nevertheless contends (Br. 13) that a district court may not take any action in the course of a jury trial that is not spelled out in a federal statute or rule unless it is "necessary to the exercise of the judicial power." But the precedents that petitioner cites address whether courts have the inherent power to sanction parties for misconduct by imposing legal disabilities not otherwise authorized by law, see *Degen* v. *United States*, 517 U.S. 820, 821-823 (1996); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 37, 44-51 (1991); *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 627-628, 630-631 (1962), or to take procedural actions that *conflict* with federal rules, see *Carlisle* v. *United States*, 517 U.S. 416, 417-418, 425-428 (1996); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). This Court has never suggested that the myriad procedural decisions that judges make in the course of managing a trial must either be supported by an ex-

press federal rule or be "necessary to the exercise of the judicial power"—a demanding standard that would, for example, bar *in limine* rulings. And in any event, even the precedents on which petitioner relies state only that an exercise of inherent power must be a "reasonable response to the problems and needs that provoke it" (absent a conflicting statute or rule), not that it must be a necessary component of judicial power. *Degen*, 517 U.S. at 823-824.

b. No federal statute or rule addresses whether and in what circumstances a district court may revoke an order discharging a jury. Like other aspects of managing a petit jury, therefore, the revocation of a discharge order presumptively falls within a district court's "inherent authority to manage the course of trials." *Luce*, 469 U.S. at 41 n.4. Four features of federal procedural law confirm that presumption.

*First*, federal statutes and rules do not regulate jury discharge at all, so no negative inference can be drawn from the fact that they do not specifically authorize district courts to revoke an order of discharge. No rule prescribes when a jury must be discharged, what form a discharge must take, when a discharge becomes effective, or the legal consequences of erroneously discharging the jury. Indeed, no statute or rule even requires the jury to be formally discharged, although certain rules governing other actions assume that a discharge will occur. See pp. 16-19, *infra*. Discharge is simply not an aspect of a jury trial regulated by codified law.

*Second*, it is a long-settled principle of federal procedural law that "[a]s long as a district (or an appellate) court has jurisdiction over the case, then (in absence of prohibition by statute or rule), it possesses

the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon* v. *Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981); see *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88 (1922); *Schoen* v. *Washington Post*, 246 F.2d 670, 673 (D.C. Cir. 1957) (Burger, J.); see also *Smith* v. *Massachusetts*, 543 U.S. 462, 475-476 (2005) (Ginsburg, J., dissenting on other grounds). When it adopted the Federal Rules of Civil Procedure, this Court deliberatively left undisturbed the district courts' preexisting authority to revoke interlocutory orders before final judgment. Thus, "[n]othing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i. e., until the entry of judgment." *United States* v. *Jerry*, 487 F.2d 600, 604 (3d Cir. 1973); cf. Fed. R. Civ. P 54(b); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983) ("[A]s Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown."). Thus, for example, Justice Harlan concluded that, despite the absence of any rule on point, district courts have the authority to revoke bail "as an incident of their inherent powers to manage the conduct of proceedings before them." *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (in chambers).

Petitioner has identified no sound basis to categorically exclude jury-discharge orders from that inherent authority. Although the discharge of a jury is an important moment in a civil proceeding, so is an order dismissing certain defendants from a case, denying summary judgment, or granting a new trial. But a district court may reconsider and vacate such orders

before a final judgment is entered. See, *e.g.*, *Langevine* v. *District of Columbia*, 106 F.3d 1018, 1022-1023 (D.C. Cir. 1997) (holding that a judge reassigned to a case may reconsider an order granting a new trial).

Petitioner contends (Br. 18-22) that jury-discharge orders are different because when a court discharges a jury, it irrevocably relinquishes legal control over "the former jurors *as a jury*." But while it is true that the legal effect of the discharge order is to relieve jurors of their obligation to "report to the courthouse" and deprive them of their "authority over the case" (Pet. Br. 19, 22), many other interlocutory orders have similar effects. For example, a district court may vacate an order dismissing a defendant from a case, reviving that party's obligation to appear, or an order dismissing the suit for lack of subject matter jurisdiction, reinstating the *court's* "authority over the case."

In the situation here, to remedy the error in discharging the jurors before they have returned a legally acceptable verdict, the court inevitably will have to direct *some* group of citizens to report to the courthouse and serve as a jury. There is thus no question that a court has the power to constitute a group of citizens into a jury as a remedy for the mistaken discharge. The question is only whether the court has discretion to exercise that power over the jurors who were discharged—who may be just out in the hall and may be able to clarify the verdict in a few minutes—or whether the court must always call into service a whole new slate of jurors for a full do-over of the trial. No established principle invariably prefers the latter course to the former.

*Third*, and most critically, a rule requiring a new trial whenever a judge mistakenly discharges a jury

would violate a central precept of the Federal Rules, embodied in Rule 61, that "[u]nless justice requires otherwise, no error * * * by the court or a party[ ]is ground for granting a new trial," and that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P 61. When a mistaken discharge can be remedied in a way that does not unfairly prejudice any party—for example, by revoking the discharge moments after it was entered and resubmitting the case to the jury—Rule 61 generally counsels the district court to choose that course over ordering a new trial.

Rule 61 and its statutory predecessors represented a conscious break with an older legal tradition in which district courts were required to order new trials even for trivial defects. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-554 (1984); *Kotteakos* v. *United States*, 328 U.S. 750, 757-760 & nn.9-14 (1946). "For a long period in legal history it was supposed that any error in the course of a proceeding, no matter how minor or technical, required either the trial court or the appellate court to order a new trial." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2881, at 610 (3d ed. 2012). But by 1919, Congress grew frustrated with the incessant reversal of trial outcomes on technical grounds and enacted the predecessor of today's harmless-error statutes and rules. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181; see 28 U.S.C. 391 (1934); cf. 28 U.S.C. 2111 (harmless-error statute for courts of appeals). Recognizing that "[t]he expense and delay caused by the retrial of an action often defeats the ends of justice," H.R. Rep. No. 913, 65th Cong., 3d

Sess. 1 (1919), Congress thereby codified the "salutary policy" of "substitut[ing] judgment for automatic application of rules," *Kotteakos*, 328 U.S. at 758-760. Rule 61 and its analogues essentially embody "a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'" *Id.* at 760.

Similar principles require a district court, "[b]efore granting a mistrial," to "consider whether the giving of a curative instruction or some alternative less drastic than a mistrial is appropriate." *United States* v. *Martin*, 756 F.2d 323, 328 (4th Cir. 1985) (en banc). And for like reasons, this Court has held that a district court must exercise its inherent remedial power in a manner that conforms with and complements harmless-error rules. In *Bank of Nova Scotia*, the Court held that a court may not dismiss an indictment to penalize prosecutorial misconduct where the misconduct did not prejudice the defendant. 487 U.S. at 254-257. The court explained that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry." *Id.* at 254.

That principle should guide the analysis here. Given that no statute or rule prohibits a district court from revoking a mistaken order of discharge, Rule 61 impels the conclusion that such remedial power is available to district courts. Where the remedy of revocation would rectify the mistaken discharge without prejudicing any party's substantial rights, the "salutary," congressionally mandated policy of disregarding harmless technical errors in trials requires district courts to choose that course over the drastic remedy of ordering a new trial.

*Finally*, federal statutes and rules generally leave protection of jury impartiality and guarding against outside influence to the sound judgment of district courts. No statute or rule, for example, requires a court to admonish the jurors to avoid outside influence during midtrial separations, a protective measure that has instead developed as a matter of judicial practice, or prescribes the content of such admonitions. Nor does any statute or rule address how a district court should evaluate an allegation that a juror actually has been subject to improper influence or extraneous information. That is significant because petitioner's principal justification for requiring a new trial whenever a discharged jury returned a legally unacceptable verdict is that the jurors could be exposed to prejudicial outside influences while no longer under an instruction to avoid them. But given that federal procedural law otherwise commits the policing of outside influence to the discretion of the district courts, it would be anomalous if the law were construed to deprive courts of authority to formulate case-specific remedies for the potential of improper outside influence only in erroneous-discharge cases—many of which, like this case, involve a period of only a few minutes.

c. Petitioner contends (Br. 14) that certain of the Federal Rules "necessarily imply" that district courts lack the power to revoke a discharge order. That argument, which petitioner raised for the first time in his merits brief in this Court (see Resp. Br. 11-16), should be rejected.

Petitioner principally relies (Br. 14-15, 23-24) on Federal Rule of Civil Procedure 51(b)(3), which provides that "[t]he court * * * may instruct the jury at

any time before the jury is discharged." Petitioner extrapolates (Br. 15) from that permissive rule that a court may not revoke an order of discharge, at least if the court intends to further instruct the jury, because in that circumstance the court would instruct the jury after the (revoked) discharge.

Petitioner's inference is unsound. Once a district court revokes an order discharging a jury, that order is a legal nullity. After the jury resumes deliberations and returns an acceptable verdict, or the court declares a mistrial, the jury will be discharged again, this time definitively and without error. Any clarifying instructions given after revocation of the first discharge order will have complied with Rule 51(b)(3), because they will have been given before the second and proper order of discharge. By analogy, Rule 51 generally requires parties to submit proposed instructions "before or at the close of evidence." Fed. R. Civ. P 51(a) (capitalization omitted). But that provision does not imply that the court lacks the power to reopen the presentation of evidence after it has been closed. See, *e.g.*, *United States* v. *Cohen*, 888 F.2d 770, 775 (11th Cir. 1989); cf. *Link*, 370 U.S. at 630 (discerning no "negative implication" that a rule's "permissive language" was intended to "abrogate" judicial authority).

Petitioner has not identified any plausible basis to conclude that Rule 51(b)(3) was actually intended to foreclose a court from revoking a jury-discharge order. In fact, Rule 51 originally did not even mention discharge, providing only that "the court shall instruct the jury after the arguments are completed." Fed. R. Civ. P. 51 (1938). The reference to "discharge[]" was introduced in a 2003 amendment to "reflect[] common

practice." Fed. R. Civ. P 51 advisory committee's note (2003). Petitioner has pointed to no evidence suggesting that the change was meant to resolve the question whether a district court may revoke a jury-discharge order. And indeed, the corresponding Criminal Rule (Rule 30(c)), which petitioner acknowledges (Br. 15 n.2) is designed to have "the same effect," still does not mention discharge.

Petitioner also relies (Br. 17-18) on Federal Rule of Civil Procedure 48(c), which provides that the jury may be polled "before the jury is discharged." That argument suffers from the same flaw as his Rule 51(b)(3) argument: The revocation nullifies the original discharge order, and the jury may be polled before the second order of discharge. And again, there is no indication in the history of Rule 48(c) or the Criminal Rule on which it is based (Rule 31(d)) that either was intended to bar revocation of jury-discharge orders.

The other rules that petitioner cites (Br. 15-17, 18-19) are still further afield. Civil Rule 59 and Criminal Rule 33(a) do not list revocation of a discharge order as an available judicial response to a motion for a new trial because it is not an appropriate response to such a motion. Accord Fed. Civ. P 50(b) (motion for judgment as a matter of law). The movant is asking the court to empanel a *new* jury, not to revoke the discharge order. A party who believes that there are grounds to revoke the discharge order—*i.e.*, a facially unacceptable verdict, not merely a verdict against the weight of the evidence or resting on some other flaw that might call for a new trial—should move to revoke the discharge. And Rule 59 permits a district court to reopen a *bench* trial instead of holding a new trial presumably because the same judge would typically

be the adjudicator in the new trial (the judge was never discharged), and it may be more efficient to reopen the first proceeding to receive additional evidence.

Finally, petitioner cites (Br. 17-18) Federal Rule of Criminal Procedure 29(c)(1), which requires a criminal defendant to move for acquittal within 14 days of the jury's discharge. Petitioner posits that if a court has the power to revoke an order discharging a jury, the court could effectively circumvent that time limit. But our submission here is that a district court has power to revoke a discharge order as a means to address a facially invalid verdict. A district court would abuse its discretion if it revoked a discharge order for the sole purpose of circumventing a mandatory time limit, just as it would abuse its discretion if it delayed the initial discharge for the same illegitimate purpose.

***2. A district court may revoke a discharge and resubmit the case to the jury only if doing so will not unfairly prejudice any party***

For the foregoing reasons, a district court has the basic underlying authority to revoke an order erroneously discharging a jury before it has returned an acceptable verdict. But under Civil Rule 61, the court may resubmit the case to the jury, rather than ordering a new trial, only if doing so would not "affect any party's substantial rights," *i.e.*, only if the period of erroneous discharge did not expose the jurors to prejudicial outside influences or otherwise impair their ability to render an impartial verdict. That standard is readily administrable, because it is the same standard that district courts apply in other contexts in which a jury's impartiality is questioned. And under that standard, we expect that it would be the rare case

in which a district court would determine that revocation and resubmission were warranted after the jurors have gone home.

a. This Court "has long held that the remedy for allegations of juror partiality is a hearing in which [a party] has the opportunity to prove actual bias." *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982). For example, in *Remmer* v. *United States*, 347 U.S. 227 (1954), this Court held, in a criminal case, that any "communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury"—there, an attempted bribe and ensuing FBI investigation—must be evaluated under a prejudice standard. *Id.* at 229. In other words, where it is established that there was *actual* improper influence brought to bear on the jury, the court must determine in a hearing "whether or not it was prejudicial." *Id.* at 230. Trial courts "retain wide latitude over how to conduct such hearings * * * and substantial discretion over the determination of whether the prejudice arising from an unauthorized contact is rebutted or rendered harmless," as well as "broad discretion in choosing how to remedy such prejudicial influences." *Evans* v. *Young*, 854 F.2d 1081, 1084 (7th Cir. 1988).

Courts conduct the same type of case-specific prejudice inquiry, and retain the same broad remedial discretion, to address a host of questions about jury impartiality, such as whether adverse pretrial publicity requires a transfer of venue or the exclusion of certain jurors, see *Skilling* v. *United States*, 561 U.S. 358, 377-399 (2010); whether adverse midtrial publicity requires jury sequestration, see, *e.g.*, *United States* v. *Salerno*, 868 F.2d 524, 540 (2d Cir.), cert. denied,

491 U.S. 907, and 491 U.S. 811 (1989); whether juror misconduct, such as premature deliberations, inattentiveness or sleeping during trial, or review of extraneous material about the case, requires a mistrial, see, *e.g.*, *United States* v. *Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000), cert. denied, 532 U.S. 1039 (2001); and, as particularly relevant here, whether a district court's failure to instruct the jury to avoid outside influences during a midtrial separation requires a mistrial, see, *e.g.*, *United States* v. *Nelson*, 102 F.3d 1344, 1346 (4th Cir. 1996), cert. denied, 520 U.S. 1203 (1997); *Wiesner*, 789 F.2d at 1268 (7th Cir.); see also *United States* v. *Jadlowe*, 628 F.3d 1, 19-21 (1st Cir. 2010) (failure to admonish against premature deliberations), cert. denied, 563 U.S. 926 (2011). District courts thus have broad experience in determining whether any of a diverse array of events renders a jury incapable of reaching an impartial verdict.

In deciding whether to revoke an erroneous discharge order and resubmit a case to the jury, district courts should conduct the same prejudice analysis that they conduct in those other contexts. First, a court should inquire whether anything occurred during the period of discharge—which will often have been very brief, see pp. 23-24, *infra*—that might have tainted the jurors' impartiality. That purely factual inquiry is not qualitatively different from determining whether a juror has been exposed to improper outside influence, extraneous information about the case, or adverse publicity. If any juror has been exposed to potential taint, the district court should then evaluate whether it is so prejudicial as to impair the juror's ability to be impartial—as courts regularly do in far more factually complex contexts than the typical

mistaken-discharge case. See, *e.g.*, *Skilling*, 561 U.S. at 395-399.

In many cases, the prejudice inquiry will be straightforward. If, as here, the period of discharge lasted a "few minutes" and the jurors respond that they did not discuss the case with anyone, Pet. App. 31a, the lack of prejudice will be readily apparent. In contrast, if a juror states that he or she discussed the case with a party's counsel after dismissal, that would raise an exceptionally strong inference of prejudice that a district court should probe thoroughly. Although cases will arise that fall between those two extremes, as with all other questions of jury impartiality, district courts can be trusted to fairly "determine the circumstances, the impact thereof upon the juror[s], and whether or not [they were] prejudicial." *Remmer*, 347 U.S. at 230.

b. Petitioner asserts (Br. 38-39) that without a rule effectively requiring a new trial whenever a jury is erroneously discharged before it has returned a legally acceptable verdict, the potential for jurors to be recalled could last indefinitely, creating uncertainty for litigants and hardship for jurors. But the standard proposed here would not allow anything remotely so open-ended. Although district courts have the underlying authority to revoke a discharge order until a final judgment is entered, a court may resubmit the case to the jury only if it determines that doing so would not impair the substantial rights of any party.

Under that standard, we expect that once the jurors have returned to their homes and daily lives, a district court would ordinarily presume prejudice in light of the natural propensity of jurors to talk to friends and family about a completed trial. See *Unit-*

*ed States* v. *Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987). It would therefore be the exceptionally rare case, for example, in which a district court would revoke a discharge order and resubmit a case to the jury more than an hour after the jury was discharged. There may be circumstances in which that would be within a district court's discretion—for example, where the jurors would be asked only to clarify unclear handwriting in a damages amount on a verdict form. But in a case in which the jury would have to resume deliberations to correct or complete the verdict, it would ordinarily be an abuse of discretion to resubmit the case after jurors have had a material opportunity to discuss the case with family, friends, and others, and after the trial evidence and arguments have begun to recede from the jurors' memories.

This case does not present any question about the outer limits of a district court's discretion, because the period of discharge was de minimis—a "few minutes"—and no juror talked to anyone about the case. Pet. App. 31a. But were this Court inclined to provide additional guidance to lower courts, it could establish a strong presumption of prejudice once jurors have definitively dispersed from the courthouse and individually headed back to their daily lives.

It is important to bear in mind, however, that the cases in which the question presented has arisen in lower courts, including those involving the United States, have often involved very short periods of discharge, as here. For example, in *United States* v. *Figueroa*, 683 F.3d 69 (3d Cir. 2012), the judge realized "[i]mmediately upon [the jurors'] exit" from the courtroom after discharge that a bifurcated felon-in-possession count had to be tried. *Id.* at 72. Similarly,

in *United States* v. *Rojas*, 617 F.3d 669 (2d Cir. 2010), a court clerk made a mistake in reading a criminal verdict into the record that was not discovered until six minutes after the jury was "pronounced 'discharged,' and had returned to the deliberation room to await the thanks of the court for its service." *Id.* at 673, 678 n.3. Other cases involve similarly de minimis periods of discharge. See *Wagner* v. *Jones*, 758 F.3d 1030, 1032-1033 (8th Cir. 2014) (two minutes), cert. denied, 135 S. Ct. 1529 (2015); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam) (jury still in the courthouse); *Lapham* v. *Eastern Mass. St. Ry. Co.*, 179 N.E.2d 589, 590-591 (Mass. 1962) (within five minutes); *Masters* v. *State*, 344 So. 2d 616, 619 (Fla. Dist. Ct. App.) ("within minutes of [the] discharge"), cert. denied, 352 So. 2d 173 (Fla. 1977).

The standard proposed here would permit district courts to correct those kinds of momentary mistakes without having to redo a trial that might have lasted weeks or months. There is no reason to believe that conscientious district courts would revoke discharge orders days or weeks after dismissing jurors, and any such decision would be subject to reversal on appeal for an abuse of discretion. Nor is there reason to doubt that a district court is capable of ensuring that jurors were not prejudiced during a brief, minutes-long period of discharge, just as courts regularly do in all of the far more complex contexts discussed above.

c. In this case, the trial court did not abuse its discretion in determining that revoking the order of discharge would not prejudice any party (and petitioner does not contend otherwise). The period of discharge was extremely short—a "few minutes"—and the jurors stated that they had not discussed the

case with anyone. Pet. App. 27a, 30a-31a. In that circumstance, it was not an abuse of discretion to resubmit the case to the jury with a clarifying instruction. Although the court did not examine each juror individually, that too was not an abuse of discretion given the failure by petitioner to request such an examination, the exceedingly short period of discharge, and the jurors' clear responses to the court's inquiry that they had not been exposed to any outside influence.

### B. This Court Should Reject A Categorical Rule Barring Revocation Of A Discharge

No convincing justification supports petitioner's draconian rule, which would invariably require courts to redo lengthy, costly trials even where jurors were discharged for a matter of minutes and were exposed to no prejudicial taint.

#### *1. Petitioner's categorical rule is not compelled by old state common-law decisions*

Apart from his erroneous contention that the Federal Rules foreclose revocation of a discharge order (see pp. 16-19, *supra*), petitioner's principal basis for a flat bar on revoking a discharge order is that "courts historically did not exercise such authority." Br. 25. Petitioner cites (Br. 26) four 19th-century state-court decisions, one of which contains no legal reasoning whatsoever. See *Mills* v. *Commonwealth*, 34 Va. (7 Leigh) 751 (1836). Those courts did not state that the rule they applied was a constitutional requirement or rested on any other basis that could be thought to bind federal courts today. Instead, they appear to have applied their own state common law of trial procedure.

Moreover, early American practice does not appear to have been nearly as uniform as petitioner's citations suggest. For example, in *Prussel* v. *Knowles*, 5 Miss. (4 Howard) 90 (1839), "after [the verdict] had been returned into court, and the jury discharged," and after all but one juror had left the courtroom, the trial judge called the jury back to correct an evident mistake in the verdict. *Id.* at 90, 95. Noting that there was no allegation of "misbehaviour in the jury," Mississippi's highest court rejected the argument that "the power of the court or the jury over the verdict ceased, as soon as it was handed to the clerk, and the jury dismissed," and ruled that the judge was not "bound to send the case to a new jury." *Id.* at 95-97.

Similarly, in *Nims* v. *Bigelow*, 44 N.H. 376 (1862), the jurors separated after the verdict "with the understanding that their duties had been discharged," and "when they might have considered their connection with the case ended" and believed that they were "at liberty to talk about it," but were then sent back for further deliberations after the judge noticed an error in the verdict. *Id.* at 380-382. New Hampshire's highest court upheld the revised verdict, explaining that although the jury's post-discharge separation "goes to the greater probability of abuse[,] * * * nothing of the kind is proved or suggested." *Id.* at 381-382; see *Dearborn* v. *Newhall*, 63 N.H. 301, 303 (1885).

Other early decisions appear to have applied a similar analysis focused on prejudice.[1] Some jurisdictions applied intermediate standards, such as permit-

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[1] See *Boyett* v. *State*, 26 Tex. Ct. App. 689, 705 (1886); *Sigal* v. *Miller*, 25 S.W. 1012, 1013 (Tex. Civ. App. 1894); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675 (Ky. 1898).

ting revocation to correct matters of "form," see, *e.g.*, *Schoolfield* v. *Brunton*, 36 P 1103, 1104 (Colo. 1894), or so long as the jury had not "dispersed" and "mingled" with "bystanders," *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926). And many (perhaps most) other jurisdictions appear simply never to have considered the question in an early decision.

In any event, even if petitioner were correct about the procedural law of the 19th century, his argument ignores how the background legal landscape has fundamentally changed since that period. Under pre-Founding English common law, jurors were not permitted to separate, or even to eat or drink, during deliberations, a rule that was designed at least in part just to force them to reach a verdict. L.S. Tellier, *Separation or dispersal of jury in civil case after submission*, 77 A.L.R.2d 1086 (1961). Early American courts followed the "rule of the common law" by requiring juries "to be kept together until they have agreed on a verdict," and "set[ting] aside" any verdict rendered after separation. *Lester* v. *Stanley*, 15 F Cas. 396, 396-397 (D. Conn. 1808) (Livingston, J.) (riding circuit). Over the course of 200 years, however, American courts and legislatures gradually discarded the strict common-law rule against jury separation. Yet even in the 20th century, many courts continued to forbid juries from separating during deliberations. See *Richardson*, 817 F.2d at 889; see also 2 Seymour D. Thompson, *A Treatise on the Law of Trials* §§ 2551-2552, at 1827-1830 (2d ed. 1912). Indeed, the Seventh Circuit abandoned the rule that a criminal jury could not separate during deliberations

only in 1978. See *United States* v. *Arciniega*, 574 F.2d 931, 932, cert. denied, 437 U.S. 908 (1978).

Under a legal regime that prohibited a jury's separation at any time during deliberations, it was natural to conclude that the jurors could not be recalled after discharge once they had left the courtroom. Indeed, one of petitioner's 19th-century decisions expressly relied on the principle that "in no case, can the jury, after they have retired, to consider * * * their verdict, be permitted to separate and disperse, until they have agreed." *Sargent* v. *State*, 11 Ohio 472, 473 (1842).

But that is no longer the law. Today sequestration is the exception, not the rule, and juries are widely permitted to separate during recesses in deliberations under circumstances where no prejudice would result. Given that fundamental shift, it no longer makes sense to apply a categorical rule barring revocation of discharge in any circumstance. Rather, just as with midtrial separations—including, critically, when a trial judge forgets to give jurors an admonition against exposure to outside influence—the question should focus on whether the jury was exposed to prejudicial taint.

Most significantly, petitioner's historical argument ignores the adoption in 1919 of a harmless-error standard for new trials in federal court. See pp. 14-15, *supra*. As explained above, that standard was designed to do away with inflexible common-law rules requiring a new trial even for trivial or technical defects in a proceeding. In light of that sea change in procedural law, the unyielding rule once articulated by some state courts is no longer justifiable.

Indeed, in 1911, the Nebraska Supreme Court, applying a recently enacted state-law harmless-error statute materially identical to Rule 61, reached precisely that conclusion. In *Henkel* v. *Boudreau*, 130 N.W 755, the jurors had been recalled two minutes after discharge, even though some jurors had made it to "the lower floor of the building," when a question was raised about the verdict's damages amount. *Id.* at 754-755. They were then "sent back to the jury room with [further] instructions" and revised the verdict. *Id.* at 754. The Nebraska Supreme Court explained that although "the inflexible rule of the common law" was "that no correction could be made after the receipt of a verdict and discharge of the jury," courts were no longer "bound to follow that ancient line of practice" in light of the harmless-error statute. *Ibid.* The court upheld the verdict after finding "no evidence of any improper action or conversation by any juror, or that any person approached them or spoke to them upon any question involved in the case." *Ibid.* That is the correct approach here.

***2. Petitioner's categorical rule would impose substantial costs with virtually no benefits and would produce unjustifiable anomalies***

There is no practical justification for a categorical rule barring revocation of a discharge order and resubmission of the case to the jury. Such a rule would require a new trial after even a minutes-long period of discharge and even where a district court, applying the same standard that courts regularly apply to other allegations of jury taint, has determined that the jurors were not prejudiced by any outside influence or extraneous information.

That senselessly formalistic regime would impose substantial costs on the judicial system, parties, witnesses, and jurors out of all proportion to any perceived benefits. As this Court has explained, "[t]rials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials." *McDonough Power Equip.*, 464 U.S. at 553. "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean" for a defect shown to have been harmless. *Id.* at 555. Although petitioner frames his proposed categorical prohibition as solicitous of the rights of jurors, that rule would require a court to call into service an entirely different group of citizens to be present for a full do-over of a trial—which could last weeks or months—when the first jury might have clarified or corrected the verdict in short order.

Moreover, petitioner's rule would create a glaring legal anomaly in the federal system. As explained above, even when jurors have *actually* been exposed to improper outside influences, such as attempted bribes or contact with a party's counsel, or have engaged in misconduct, such as sleeping during trial or conducting premature deliberations, courts require a new trial only upon a finding of prejudice. See pp. 20-22, *supra*. But petitioner would have this Court adopt a blanket prohibition against revocation of a discharge and resubmission to the jury even where, during a brief period of discharge, jurors were subject to no improper outside influences at all. That distinction cannot be justified. Indeed, the situation here is similar to a district court's failure to admonish jurors to

avoid outside influences during a midtrial recess and separation. Yet that omission requires a new trial only upon a showing of prejudice.

Petitioner's efforts to justify the inflexibility of his rule lack force. Petitioner expresses concern that during the period in which jurors are discharged, they might discuss the case with interested parties or read press coverage (unlikely in the minutes-long period here for a routine case). A prejudice standard is more than sufficient to deal with that potential, just as it suffices for cases of actual improper influence, adverse publicity, juror misconduct, or failures to admonish.

Petitioner also hypothesizes (Br. 34-35) that the jurors' observation of the parties' reactions to the verdict might have a "psychologically significant" effect. Whatever its plausibility, that argument is logically flawed: Petitioner does not dispute that when a jury returns an ambiguous or otherwise unacceptable verdict, a district court has discretion to resubmit the case. In that situation, like the situation presented here, the jury could also gauge the parties' reactions to the verdict—and experience whatever psychological effect that entails. Whether the jury is erroneously discharged after announcing the unacceptable verdict has no bearing on that possibility. Likewise, there is no basis to believe that vacating a discharge order will entail any greater threat of coercion than resubmission of the case before discharge. See Pet. Br. 35.

In short, given that many mistaken-discharge cases involve a period lasting a few minutes, see pp. 23-24, *supra*, and given that district courts have substantial experience evaluating whether jurors have been exposed to prejudicial outside influences, there is no

practical justification for a rule that would invariably nullify an entire trial because the jurors stood in the hallway for a moment after a mistaken discharge.

### C. A Prejudice Standard Comports With Due Process And The Seventh Amendment

Petitioner does not advance any argument that the revocation of the jury-discharge order was unconstitutional. But in any event, a prejudice standard necessarily comports with due process, because it is derived directly from this Court's constitutional precedents. As this Court explained in *Smith* v. *Phillips*, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," because "[w]ere that the rule, few trials would be constitutionally acceptable." 455 U.S. at 217. Rather, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Ibid.*[2]

Nor does revocation of a discharge order violate the Seventh Amendment's jury-trial guarantee. The amendment did not freeze in place jury-trial procedural rules that existed at the time of the Founding. As discussed above, the rules for when a jury could separate evolved substantially over the last two centuries, and the current rules would be unrecognizable to

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[2] In a criminal case in which a jury returns a verdict of acquittal, the question would arise whether the Double Jeopardy Clause restricts the judge's authority to revoke a discharge. Cf. *Smith* v. *Massachusetts*, 543 U.S. at 474 ("Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury.").

the Founding generation. There is no sound basis to conclude that the post-discharge rule applied by some 19th-century courts was constitutionally fixed, particularly after the fundamental shifts in the background legal context discussed above, and the early practice was not uniform in any event. See pp. 26-29, *supra*. The Seventh Amendment guarantees a right to trial by jury, and that is exactly what petitioner received. He has no right to a rematch.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

1. U.S. Const. Amend. V Due Process Clause provides:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *

2. U.S. Const. Amend. VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

3. Fed. R. Civ. P 48(c) provides:

**Number of Jurors; Verdict; Polling**

(c) **Polling.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

4. Fed. R. Civ. P 49(b) provides:

**Special Verdict; General Verdict and Questions**

**(b) General Verdict with Answers to Written Questions.**

(1) ***In General.*** The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) ***Answers Inconsistent with the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) ***Answers Inconsistent with Each Other and the Verdict.*** When the answers are inconsistent with each other and one or more is also incon-

sistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

5. Fed. R. Civ. P 50(b) provides:

**Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling**

(b) **Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

6. Fed. R. Civ. P 51 provides in pertinent part:

**Instructions to the Jury; Objections; Preserving a Claim of Error**

**(a) Requests.**

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

**(b) Instructions.** The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

* * * * *

7. Fed. R. Civ. P 59 provides in pertinent part:

**New Trial; Altering or Amending a Judgment**

**(a) In General.**

(1) ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 28 days after the entry of judgment.

* * * * *

8. Fed. R. Civ. P. 61 provides:

**Harmless error**

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

9. Fed. R. Civ. P. 83(b) provides:

**Rules by District Courts; Judge's Directives**

(b) **Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

10. Fed. R. Crim. P. 29(c)(1) provides:

**Motion for a Judgment of Acquittal**

(c) **After Jury Verdict or Discharge.**

(1) **Time for a Motion.** A defendant may move for a judgment of acquittal, or renew such a motion,

within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

11. Fed. R. Crim. P. 30(c) provides:

**Jury Instructions**

**(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times.

12. Fed. R. Crim. P. 31(d) provides:

**Jury Verdict**

**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

13. Fed. R. Crim. P. 33 provides:

**New Trial**

**(a) Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

**(b) Time to File.**

**(1) Newly Discovered Evidence.** Any motion for a new trial grounded on newly discovered evi-

dence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) **Other Grounds.** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

14. Fed. R. Crim. P. 52 provides:

**Harmless and Plain Error**

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

15. Fed. R. Crim. P. 57(b) provides:

**District Court Rules**

(b) **Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.